(25,792)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 420.

HENRY G. S. NOBLE, AS PRESIDENT OF THE NEW YORK STOCK EXCHANGE, APPELLANT,

vs.

THE UNITED TELEGRAM COMPANY, CALVIN H. FOSTER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 739. Equity Docket.

HENRY G. S. NOBLE, Plaintiff,

v.

THE UNITED TELEGRAM COMPANY et al., Defendants.

The Bill of Complaint in this cause was filed in the Clerk's office on the sixth day of July, A. D. 1916, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed July 6, 1916.)

HENRY G. S. NOBLE, as President of the New York Stock Exchange, a Voluntary Unincorporated Association, Suing on His Own Behalf and on Behalf of All the Other Members of Said Association, Complainant,

against

THE UNITED TELEGRAM COMPANY and CALVIN H. FOSTER, Defendants.

To the Honorable Judge of the District Court of the United States for the District of Massachusetts:

The complainant above named brings this his bill of complaint against The United Telegram Company a corporation organized and existing under the Laws of the State of New Jersey doing business in the District aforesaid, and Calvin H. Foster a citizen and resident of the State of Massachusetts and District aforesaid and alleges upon information and belief as follows:

1. The New York Stock Exchange is a voluntary unincorporated association having more than one thousand members authorized by the Laws of the State of New York to sue and be sued in the name of its President; one of the objects of said association is to furnish Exchange Rooms and other facilities for the convenient transaction of their business by its Members as brokers. Its Exchange Rooms are situated in the Borough of Manhattan, City of New York, and are maintained by the Stock Exchange as a place where its Members may daily gather for the purpose of buying and selling to each other certain corporate stocks, bonds and other securities which 3 have been approved and listed for trading purposes by said Exchange. Henry G. S. Noble is President of the New York

Stock Exchange and brings this bill of complaint as such President and also on his own behalf and on behalf of all the other Members of said Association.

The United Telegram Company is a corporation organized and existing under the Laws of the State of New Jersey and transacting a telegraph business in the City of Boston, State of Massachusetts.

2. That said Exchange Rooms are maintained by said New York Stock Exchange and are open for trading by Members from ten o'clock A. M. until three o'clock P. M. of each business day except Saturday, when such Exchange closes at twelve o'clock M., and that during all of said hours of each day all of its Members do gather there, and buy from and sell to each other large quantities of said stocks and other securities, and all trading is done by open viva voce bidding between Members, and that none but Members of said Exchange are permitted to participate in such trading or bidding; and that none but such Members (and their employees) and the employees of said Stock Exchange are permitted to enter upon the floor of said Exchange during said market hours.

3. That the promptly acquired knowledge of the prices made from time to time in said bidding is of special value to the Members of said Exchange and such of their customers as desires to purchase said stocks, bonds or securities of said Exchange and to the banks with which said Members have occasion to transact their business and that for the purpose of making such knowledge immediately available, said Stock Exchange at a yearly expense of upwards of $42,000. employs a number of persons to attend the place
4 where such bidding is taking place in such Exchange Hall during said market hours and to immediately note upon slips of paper the price of each transaction made upon said Exchange and to cause said prices to be immediately delivered to telegraph operators there employed by said Stock Exchange, whose duty it is to transmit, and who do immediately transmit, said quotations to a room in said Exchange Building set apart for that purpose, and that said prices so noted, gathered and transmitted, constitute what are known as the continuous market quotations of said New York Stock Exchange; and that from said room said Stock Exchange, through agencies provided by it for that purpose, does transmit, and has for many years transmitted, over wires and by means of telegraph instruments known as "tickers" said quotations to such of its Members as desire to receive the same in that part of the City of New York known as the Borough of Manhattan, lying south of Chambers Street.

4. That in the year 1909, the Hon. Charles E. Hughes then Governor of the State of New York appointed a Commission to inquire into the subject of speculation in securities and commodities, and that under date of June 7, 1909, said Commission made its report to said Governor in which said Commission recommended that said Stock Exchange take such steps as were feasible to prevent the misuse of its said quotations in bucketshops.

5. That in conformity with said recommendation of said Hughes Commission thesaid Stock Exchange entered into a new contract dated

October 1st, 1914, with said, The United Telegram Company in and by which said contract said Exchange agreed at its own expense to furnish to said Telegram Company full and continuous quotations of prices made in said transactions in said Exchange Rooms by means of a stock ticker installed in the office of the Postal Telegraph Cable Company in the Borough of Manhattan, City of New York, State of New York; and said contract authorized said telegram company to furnish said quotations to any person in the City of Boston, State of Massachusetts provided that said telegram company would not furnish quotations by ticker or otherwise in the volume of a continuous service which is defined to be oftener than at intervals of fifteen minutes (and is in said contract referred to as continuous quotations) to any subscriber therefor, who shall not have signed in duplicate an application therefor addressed to said telegram company and who shall not have been approved by the said Exchange; and it was by said contract expressly provided that one of said applications, when signed by said applicant, should be delivered to the said Exchange, but that said application and acceptance thereof by the telegram company should not be effectual for any purpose until each subscriber should be approved by said Exchange; it being by said contract provided that, in case any person whose application has been accepted, shall fail to comply with the conditions, restrictions and limitations contained in the application signed by him, said telegram company, at its own cost and expense, would terminate the contract between him and said telegram company, and the furnishing to him of said quotations thereunder; and it was provided by said contract that said Exchange should receive from said Telegram company the sum of $9,000. per year; a copy of said contract containing the form of said application is attached and made a part of this bill as Exhibit A, as fully as if set out at length in this bill.

6. That said contract has been since the 14th day of November, 1914, and still is in full force and effect, and said market quotations have since said date and now are furnished to said telegram company only in the manner prescribed in said contract, and your orator is informed and believes and avers that said telegram company is now distributing the same only in strict compliance with the terms of said contract and is not now furnishing said continuous quotations to any person who has not signed an application and whose application has not been approved by said Stock Exchange as in said contract provided.

7. That on or about the 14th day of November, 1914, the defendant, Calvin H. Foster signed and delivered to said United Telegram Company an application in the form set out in said contract which said application was by said telegram company forwarded to said Stock Exchange for its action as provided in said contract; that said Stock Exchange caused an investigation to be made into the business associations of said Foster, notifying said Foster to appear before one of the Committees of the Exchange and giving him a full and fair hearing before said Committee; that as a result of such careful and impartial investigation said Exchange has reached the conclusion that said Foster had been for a number of years engaged in

conducting bucketshops in the City of Boston and State of Massachusetts and desires said quotations for that purpose, and your orator and said Exchange are informed and believes that said Foster through said application desires to obtain said quotations for the purpose of either using the same in conducting a bucketshop or for the purpose of selling said quotations to persons who are conducting buckethops and desire said quotations for use therein, and as a result of such investigation and because of its conclusion as
7 to the purpose of said Foster, said Stock Exchange on the 16th day of April, 1915, notified said United Telegram Company that the application of said Foster as set forth had been disapproved and your orator is informed and believes that by reason of said notice and not otherwise the United Telegram Company has refused to furnish said Foster with said continuous quotations.

8. That on or about the 4th day of March, 1915, the defendant Calvin H. Foster filed with the Public Service Commission of the State of Massachusetts his complaint alleging his inability to obtain either from the United Telegram Company or the Gold and Stock Telegram Company a ticker furnishing quotations made on the New York Stock Exchange, although he had made proper application therefor to both companies and offered to pay the charges for this service, a copy of which complaint is hereto attached and marked Exhibit B, and made a part hereof; that thereafter said Public Service Commission caused a copy of said complaint to be served upon the said United Telegram Company and the Gold & Stock Telegraph Company and that on the 15th day of April 1915, said United Telegram Company made answer to said complaint a copy of which is hereto attached and made a part hereof as Exhibit C, except as to the Exhibit thereof which is elsewhere hereto attached, and said Western Union Telegraph Company on behalf of said Gold & Stock Telegraph Company of which said Western Union Telegraph Company is the lessee also made a similar answer to said complaint; and that thereafter on the 7th day of September, 1915, said Public Service Commission made and entered upon its records an order that said Gold & Stock Telegraph Company by said Western Union Telegraph Company lessee, and the said United Telegram Company had without just cause denied and refused to supply said Calvin
8. H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others and ordering said two telegraph companies to forthwith remove said discrimination; that thereafter and on the 27th day of September, 1915, said Western Union Telegraph Company and said United Telegram Company joined in a petition in the Supreme Court of Massachusetts for the County of Suffolk, under the provisions of the Statute of the State of Massachusetts enacted in the year 1913, against said Calvin H. Foster and the Members of the said Public Service Commission praying that said ruling and order of said Commission be annulled and on the 15th day of April, 1915, the Members of said Public Service Commission pursuant to said Statute also filed in said Supreme Court their bill of complaint against said Western Union Telegraph Company and said United

Telegram Company and setting up said order of said commission and praying for a decree enjoining said two telegraph companies to furnish said Foster said quotations by means of ticker service upon his making due payment therefor. That on the first day of December, 1915, said Supreme Court entered an order or reservation consolidating said two causes and reserving all questions of law therein for consideration of the full Court and pursuant to the practice of the State of Massachusetts and that thereafter said two causes came on for argument before said full Court and said Court rendered a decision and entered an order in said causes dismissing said petition of said telegraph companies with costs and directing a decree to be entered upon the order of said Public Service Commission to enjoin said telegraph companies to comply with the order of said Public Service Commission.

9 9. That said continuous quotations of said Stock Exchange after being collected by said Stock Exchange and after being received by said United Telegram Company at the office of the said Postal Telegraph Cable Company in the City of New York as aforesaid are transmitted over a telegraph wire to the City of Boston, State of Massachusetts and are there distributed by said United Telegram Company by means of instruments known as tickers to the offices of brokers and others in the City of Boston who desire to obtain said quotations and whose applications therefor have been approved by said Stock Exchange as aforesaid; that said transmission of said quotations from New York and the re-transmitting thereof by means of said tickers at the City of Boston begins immediately after the opening of the market of said New York Stock Exchange at ten o'clock A. M., and is thence continued uninterruptedly until the closing of said market on that day, and that in said method of transmission from New York and distribution in the City of Boston, the identical market news or quotations, which are so sent out from New York upon said wire, pass over each of said ticker wires and are printed upon each of said tickers, and your orator claims that the said transmission and distribution of said quotations as aforesaid is interstate commerce within the meaning of the Constitution of the United States conferring on Congress the exclusive right to regulate interstate commerce; that Congress by amendment to the Act of Congress entitled "An Act to Regulate Commerce" of February 4th, 1887, passed June 18th, 1910, has vested in the Interstate Commerce Commission exclusive jurisdiction of all proceedings, suits or actions affecting or controlling the distribution of said quotations and

10 that the Statute of the State of Massachusetts creating such Public Service Commission and conferring thereon jurisdiction to hear complaints respecting the distribution of said quotations and the order of said Commission directing the delivery of said quotations to said Foster as well as the order of said Supreme Court confirming said order of said Public Service Commission are void.

10. Your orator is informed and believes and charges that said United Telegram Company intends to and will comply with said order of said Public Service Commission as soon as said confirming

order of said Court becomes operative and will in obedience to said order furnish to said Foster said continuous quotations.

11. That your orator and said Stock Exchange claim that said market quotations when collected and distributed as above stated constitute the property of the New York Stock Exchange and that being its property said Stock Exchange may fix a price at which it will sell said property and select the persons to whom it will furnish the same and that it has the right to avail itself of the services of any common carrier operating either wholly within the State or beyond the limits of a single state for the purpose of delivering its said quotations to persons whose application therefor it shall accept, and that said Statute creating and conferring power upon said Commission and the order of said Commission and the confirming order of said Supreme Court—which are based upon such Statute—and which require said United Telegram Company to break its
11 contract with said Stock Exchange by giving said quotations to said Foster are and each of them is in violation of the Constitution of the United States in that they deprive said Stock Exchange of its said property without due process of law.

13. Your orator further avers that the amount here involved and the matters here in dispute exclusive of interest and costs is much more than the sum of Three thousand ($3,000.) Dollars.

In tender consideration whereof and forasmuch as your orator is remediless in the premises, except in a Court of Equity, where matters of this nature are properly cognizable and relievable, and to that end your orator prays that said United Telegram Company and Calvin H. Foster who are made defendants to this bill may true, direct and complete answer make to this bill, but not under oath (answer under oath being hereby waived); and

1. That said Statute of Massachusetts creating and conferring powers upon said Public Service Commission so far as the same confers authority or powers upon said Commission to make or enforce its said order or any other order directing said United Telegram Company to furnish said quotations to said Calvin H. Foster be adjudged and declared to be in violation of the Constitution of the United States, and

12 2. That said order entered on the 7th day of September, 1915, by said Commission directing said United Telegram Company to furnish said Foster said quotations be adjudged null and void and as constituting no excuse or reason why said United Telegram Company should not as respects to said Foster comply with its contract with said Stock Exchange, and

3. That a temporary injunction may immediately issue and upon the final hearing thereof be made perpetual, restraining said United Telegram Company from delivering to said Foster and said Foster from receiving from said United Telegram Company said continuous quotations of said New York Stock Exchange until said Foster shall have first lawfully acquired the right to receive said quotations either by contract or purchase from said Stock Exchange or with its consent and approval from a telegraph company authorized by said Stock Exchange to distribute said quotations, and further enjoining

said Foster as a member of any firm or as an agent or officer of any person, firm or corporation from aiding, abetting or assisting directly or indirectly any person, firm or corporation in receiving, using, selling or distributing said quotations until such person, firm or corporation shall have first lawfully acquired the right to receive said quotations as aforesaid, and

4. That your orator and said Stock Exchange may have such other and further relief in the premises as will fully protect said Stock Exchange's property right in said quotations and as to your Honor shall seem meet.

13 May it please your Honor to grant unto your orator a preliminary and permanent injunction against the said defendants as above prayed, and also a writ of subpœna of the United States directed to said United Telegram Company and said Calvin H. Foster commanding them on a day certain to appear and answer this bill and to abide by and perform such decree as may be entered by this Court.

WALTER G. TAYLOR,
HENRY S. ROBBINS,
Of Counsel.
HENRY L. SHATTUCK,
Of Counsel.

14 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Henry G. S. Noble being duly sworn deposes and says that he is the complainant in the above entitled bill and is President of the New York Stock Exchange; that he has read the foregoing bill and knows the contents thereof and that the allegations of said bill are true of his own knowledge except as to the matters therein stated to be on information and belief and as to those matters he believes them to be true.

HENRY G. S. NOBLE.

Sworn to before me this fifth day of July, 1916.
J. M. RICHARDSON LYETH, [SEAL.]
Notary Public, Bronx County.

County Clerk's No. 24, Register's No. 700. Certificate filed in New York County. County Clerk's No. 17, Register's No. 7050. Term expires March 30, 1917.

15 EXHIBIT A.

This agreement, made and entered into this first day of October, 1914, between The United Telegram Company, hereinafter designated as "The Telegram Company" and the New York Stock Exchange, hereinafter designated as "The Exchange,"

Witnesseth:

First. The Exchange agrees to furnish to the Telegram Com-

pany under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of prices made in transactions upon the Exchange. The quotations so furnished shall include substantially such quotations and other information as have heretofore been furnished by the Exchange to the Telegram Company under the contract heretofore subsisting between them. The Exchange does not guarantee the accuracy or completeness of said quotations, but undertakes to use reasonable diligence to make the same as accurate and complete as may be practicable; it being distinctly understood and agreed, however, that the Exchange shall not be liable to the Telegram Company, or to any of the persons to whom it may furnish the same, or to any person whatsoever, for any inaccuracies, errors, or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

Second. Said quotations shall be furnished to the Telegram Company by means of a New York Quotation Company ticker installed in the office of the Postal Telegraph Cable Company, at No. 18 Broadway, Borough of Manhattan, City of New York, simultaneously with the furnishing thereof to subscribers for the ticker service of the said New York Quotation Company, except in so far as the furnishing thereof as aforesaid is prevented by accident to apparatus, or any accident beyond the control of the Exchange.

Third. The Telegram Company agrees that no one shall have access to the quotations at the said office of the Postal Telegraph Company, except the employees of the Telegram Company or of said Telegraph Company engaged in relaying or handling said quotations, and that neither said quotations nor any part thereof, nor information therein contained, shall be furnished by the Telegram Company or its employees, or by the Postal Telegraph Company or its employees to any person or in any manner except as herein provided, and that at any and all reasonable times, properly accredited persons designated by the Exchange shall have access to the said office of the Postal Telegraph Company where said ticker is installed, and also all relaying rooms in other cities and test rooms through which wires used in transmitting said quotations pass, and the right to examine in the presence of the Postal Telegraph Company's officials in charge thereof, all appliances, and observe all operations located or carried on therein. The Telegram Company further agrees that it will contemporaneously with the execution hereof by the Stock Exchange procure an agreement from the Postal Telegraph Company, whereby the said Postal Telegraph Company will obligate itself to do any and all things which on its part are necessary to be done, in order to enable the Telegram Company to carry out its covenants aforesaid.

Fourth. The Telegram Company may furnish said quotations to its subscribers at their offices in the City of Boston, State of Massachusetts, provided, however, that the Telegram Company shall not after the first day of — 1914 furnish quotations by ticker or otherwise in the volume of a continuous service, which is defined to be oftener than at intervals of fifteen (15) minutes, (and is herein referred to as continuous quotations) to any subscriber

thereof, unless the subscriber shall have signed in duplicate an application therefor addressed to the Telegram Company, and the subscriber shall have been approved by the Exchange, the said application to be substantially as follows:

"Application to the United Telegram Company for Continuous Quotations.

16 The United Telegram Company:

We hereby apply for a service of continuous quotations of the New York Stock Exchange, furnished you under contract between you and said Exchange, said quotations to be furnished to us at —— by —— ——; and we represent and agree with you as follows:

(1) That our business is and shall be the business of — and that said business is conducted under the firm name and style of —— —— and that notice of any change of the name, nature or place of said firm or business shall at once be given to the said United Telegram Company; and that we are not keeping or causing to be kept, and will not keep or cause to be kept, or be in anywise interested in, or in any way assist or promote, any bucket-shop or bucket-shop business, or any office, store or other place wherein is conducted, or permitted the business of making, or offering to make, contracts, agreements, trades or transactions, either orally or in writing, respecting the purchase or sale (or the purchase and sale), of any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such business, or the undersigned, contemplate or intend that such contracts, agreements, trades or transactions shall, or may be, closed, adjusted, or settled according, or with reference, to the quotations of any Exchange, Board of Trade, or market place, upon which stocks, bonds or other securities or commodities are dealt in; or otherwise than by an actual bona fide transaction or purchase or sale; or wherein both parties or the party maintaining such office or place or conducting such business or the undersigned contemplate or intend that such contracts, agreements, trades or transactions shall, or may, be closed or terminated when the quotations of some such Exchange, Board of Trade or market place respecting the stocks, bonds or other securities or commodities specifi-d in such contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use or allow any one else to use, such quotations or any of them for any such purpose or in any such bucket shop, office or place.

(2) That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and we will not communicate or otherwise furnish or permit to be communicated or otherwise furnished, said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person, or corporation whatsoever, to take directly or indirected said quotations from said

office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, provided that said branch office or offices shall first be approved by the New York Stock Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Stock Exchange, and we shall first obtain in duplicate (one of which shall be delivered to the New York Stock Exchange and one to you) an agreement signed by such correspondent in which said correspondent shall agree with the United Telegram Company to abide by and comply with clauses 1, 2, 3, 4 and 7 hereof. If the undersigned shall furnish, or permit to be furnished, said quotations, or any of them, to any person, firm or corporation excepting after compliance with the provisions hereinbefore contained, the undersigned hereby agrees that the United Telegram Company may sue the person, firm or corporation to whom said quotations or any of them are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making the undersigned a defendant thereto, provided the undersigned does not, or in case of a partnership all the members thereof do not, reside within the jurisdiction of the court in which said suit is brought.

(3) That the office or place above designated shall not be connected by any private telegraph or telephone wire, or other wire connection, or other means of communication with the office 17 or place of business of any person or persons, or corporation, engaged in the business of making contracts, agreements, trades or transactions respecting the purchase and sale of stocks, bonds or other securities or commodities, or with any place where such business is conducted, unless the New York Stock Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such branch offices and correspondents as have been approved in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Stock Exchange which have been approved in conformity with its rules.

(4) That at any and all times any person or persons designated by the said United Telegram Company or the said New York Stock Exchange shall have access to the office or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

(5) That the United Telegram Company may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them, by the undersigned, or whenever directed so to do by the said New York Stock Exchange.

(6) That the United Telegram Company shall not be pecuniarily liable for the accuracy of the quotations which it may furnish under this application, nor for any delays, inaccuracies, errors or omis-

sions in said quotations, or for any damages arising therefrom or occasioned thereby.

(7) That quotations upon any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to be continuous quotations within the meaning of this application.

Accepted:

THE UNITED TELEGRAM COMPANY,
By —— ——.

Applicant approved:

NEW YORK STOCK EXCHANGE,
By —— ——."

One of said applications, when signed shall be delivered to the Exchange; but said application and the acceptance thereof by the Telegram Company shall not be effectual for any purpose until the subscriber is approved by the Exchange. Notice shall be promptly given by the Exchange of its approval or disapproval of the applicant.

It is understood and agreed, however, that the Telegram Company may furnish any quotations furnished to it hereunder to its patrons at intervals of more than fifteen (15) minutes without requiring such patrons to sign said application form; but the Telegram Company shall furnish to the Exchange a list of such patrons monthly, and shall discontinue such service to any thereof to whom the Exchange may object.

Fifth. The Telegram Company shall as soon as practicable furnish to the Exchange a list of all persons to whom it is furnishing continuous quotations of the Exchange under subsisting contracts at the time of the execution hereof, with the full name, addresses and business occupations of said persons, and shall at reasonable intervals of time, when requested so to do by the Exchange, furnish the Exchange with a complete list of persons to whom it is then furnishing said continuous quotations, together with similar information in respect to them.

Sixth. The Telegram Company agrees that it will use its best efforts to prevent any persons, other than those approved by the Exchange as hereinbefore provided from obtaining said quotations; and that in case said quotations are obtained by persons not so approved, it will use its best endeavors to ascertain the source from which the same are obtained, and to inform the Exchange fully in respect thereto. The Telegram Company further agrees
18 that in case any person shall fail to comply with any of the conditions, restrictions and limitations contained in the application signed by him as hereinbefore provided, it will at its own risk, cost and expense terminate the contract between him and it and the furnishing of said quotations to him thereunder.

In case any suit or legal proceeding is brought to enjoin the Telegram Company from refusing to furnish quotations to any person, the Telegram Company shall at once inform the Exchange of such suit or proceeding, and shall permit the Exchange to intervene

therein, or to defend the same in the name of the Telegram Company, but, in such cases, the Exchange shall idemnify the Telegram Company against and save it harmless from any and all costs and damages awarded against it.

In case the Exchange institutes any suit or proceeding to enjoin any person not entitled to said quotations from obtaining or using the same, the Telegram Company will cooperate with and assist the Exchange in its prosecution; and whenever requested so to do by the Exchange, and indemnified against any cost or liability which it may thereby incur, it will institute in its name or permit the Exchange to institute in the name of the Telegram Company, any action or proceeding to prevent any persons not entitled to said quotations from obtaining or using the same. The Telegram Company shall, unless enjoined by any court from doing so, discontinue furnishing said quotations to any person whether a member or non-member of the Exchange whenever notified by the Exchange of its disapproval of such person, but in all cases of discontinuance, pursuant to notice given by the Exchange, the Exchange shall indemnify and save harmless the Telegram Company from all costs, damages, or liabilities which it may incur by reason of such discontinuance.

Seventh. The charge made by the Telegram Company for furnishing said quotations to members of the Exchange shall not in any case exceed the charge for such service made to any non-member of the Exchange similarly located.

Eighth. The Telegram Company agrees to pay to the Exchange at the rate of nine thousand ($9,000) dollars per annum during the continuance of this agreement in equal monthly installments, that is to say, seven hundred and fifty ($750.00) Dollars on the last day of each month.

Ninth. The parties hereto agree that if at any time hereafter any difference or dispute shall arise between them concerning the true intent, meaning or construction or anything contained in this contract, or concerning any matter included within the spirit or scope thereof, or concerning the acts or omissions of the Exchange or the Telegram Company in connection with the performance thereof, then, so often as a dispute or difference shall arise, any and all such matters in difference shall be submitted and referred to the award and determination of three arbitrators to be chosen one by the Exchange another by the Telegram Company, and a third by the two thus chosen; and the decision or award of any two of the arbitrators in writing shall be binding upon, and final between, the Exchange and the Telegram Company, and shall be carried out and performed by the said Exchange or the Telegram Company, as the case may be.

Tenth. It is understood and agreed that as to the right of the Exchange, hereinbefore specified, to disapprove applicants for quotations and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations.

Eleventh. This agreement shall take effect on the first day of

October, 1914, and shall continue in force until and including the 30th day of June, 1915; and shall continue in force thereafter until the expiration of the thirty days after written notice shall have been given by either party to the other terminating the same.

Twelfth. Wherever the word "person" or "persons" or "non-member" or "non-members" is used herein it shall be deemed to include firms, corporations and associations as well as natural persons. The term "member of the Exchange" shall be construed to include any firm, one or more of whose members are members of the Exchange.

Wherever, by the terms hereof, any action, approval or disapproval of the Exchange is authorized or required, the written statement of the Secretary of Assistant Secretary of the Exchange with respect thereto, shall be sufficient evidence whereof.

In witness whereof, the Telegram Company has caused these presents to be executed by its President, and its corporate seal to be hereto affixed, and the Stock Exchange has caused the same to be executed by its President and Secretary, the day and year first above written.

THE UNITED TELEGRAM COMPANY,
By CHARLES F. PARKER, *President.*

[NOTARY SEAL.] ADOLPHUS B. BEEDING,
Notary Public.

Attest:

——— ———, *Secretary.*

NEW YORK STOCK EXCHANGE,
By H. G. S. NOBLE, *President.*

Attest:

GEORGE W. ELY, *Secretary.*

EXHIBIT B.

C. H. Foster,

Member of Consolidated Stock Exchange of N. Y.

Stock Broker,

246 Washington Street,

60 Devonshire Street.

Boston, Mass.,

March 3, 1915.

Public Service Commission, 1 Beacon Street, Boston, Mass.

DEAR SIRS: I desire to notify you that I have been unable to obtain from either the United Telegram Company or the Gold and

Stock Telegraph Company a ticker furnishing the quotations made on the New York Stock Exchange. Both of these companies are organized under the Laws of Massachusetts, and are doing business in this State.

I have been engaged continuously in the stock brokerage business in the City of Boston for something like 25 years. During all that period until the latter part of December, 1914, I have had tickers giving quotations on both the New York Stock Exchange and the Boston Stock Exchange. In December, 1914, the tickers which furnish the New York quotations which I have had in my office, 246 Washington street, Boston, were removed and I have been unable to secure them since that time. I have made proper application to both companies and offered to pay the charge for the service.

It seems that since December these ticker companies will not furnish the tickers without the applications are approved by the Committee on Quotations of the New York Stock Exchange. I have appeared before that committee in New York two separate times, and have given them a full statement of my business, and answered every question which they cared to ask. So far as I know they have not yet taken any action on my application. I understand that your commission have control of this service, and I wish to make an application to this commission to have this service furnished as quickly as possible. I understand everybody wishing a ticker in the City of Boston has had their application granted excepting my application.

I have been an approved correspondent of a member of the New York Consolidated Stock Exchange since the year 1907, and within the past few months have become a member of that Exchange. Since 1907 I have done my business through a member of that Exchange who has been in good standing there. In conducting my business I have always complied with the Laws of Massachusetts in every way. I will be glad to give your commission any further information on this subject that is desired.

Yours very truly,

CALVIN H. FOSTER.

21 EXHIBIT C.

Public Service Commission of Massachusetts.

In the Matter of the Complaint of Calvin Foster

against

United Telegram Company and Gold & Stock Telegraph Company.

To the Honorable Members of the Public Service Commission of the State of Massachusetts:

The United Telegram Company has received a copy of the complaint of Mr. Calvin Foster embodied in his letter to your Honorable Commission, dated March 3rd, 1915, making certain statements concerning the United Telegram Company and the Gold & Stock

Telegraph Company, alleged to be Companies engaged in furnishing quotations of the New York Stock Exchange for distribution in the City of Boston. The United Telegram Company desires to communicate to your Honorable Commission the facts respecting the matter and states that it has no connection whatever with the Western Union Telegraph Company or with the Gold & Stock Telegraph Company.

The United Telegram Company in answer to said complaint begs to state that it is advised that the whole matter is within the sole jurisdiction of the Interstate Commission and therefore not subject-matter of which your Honorable Commissioner can take cognizance.

In order that the matter may be presented in all its aspects and in order that your Honorable Commission may be fully advised of all the facts arising in connection with said complaint, said United Telegram Company begs to state:

The United Telegram Company receives from the New York Stock Exchange in the City of New York, and State of New York, quotations of dealings on the New York Stock Exchange, for transmission to subscribers therefor in the City of Boston, Massachusetts, under and pursuant to a contract of which a copy is hereto annexed and marked Exhibit "A," executed on or about November 14, 1914.

The New York Stock Exchange for many years has been and is now a voluntary, unincorporated association having control of the building in which it is located and upon the floor of which under the rules established by it the 1100 members deal with each other in selling and buying securities either on behalf of the members or on behalf of individuals employing them to act as brokers in buying and selling stocks and bonds dealt in upon said Exchange. The quotations which the United Telegram Company receives from the Stock Exchange and delivers as hereinbefore set forth are collected by the New York Stock Exchange through its own employees on the floor of said Exchange to which floor no one except the members of said Exchange and its employees have access. Said quotations are the property of the said Exchange and are delivered to the United Telegram Company to be transmitted by it and delivered to such persons and to such persons only as are approved by the New York Stock Exchange in the manner provided in the contract of which a copy is hereto annexed and marked Exhibit "A."

The New York Stock Exchange has never approved the application of Mr. Calvin Foster as provided in said contract Exhibit "A" but on the contrary has notified the United Telegram Company that it does not approve his application, a copy of said notice being hereto annexed and marked Exhibit "B."

The United Telegram Company further says that in the absence of the approval of the New York Stock Exchange, it has no right to furnish the quotations of the New York Stock Exchange to Calvin Foster and that should your Honorable Commission make an order requiring it to furnish such quotations to him, such order would in effect require the United Telegram Company to appropriate the property of the New York Stock Exchange for the benefit of Calvin Foster, and would result in the destruction of the United Telegram

Company's contract with the New York Stock Exchange
22 contrary to the provisions of the Federal Constitution in that the United Telegram Company would thereby be deprived of its property without due process of law.

The United Telegram Company denies the complainant's allegations that everybody wishing a ticker in the City of Boston except complainant has had his application granted. It has no information as to the statement contained in the complainant's letter of March 3rd as to his business relations in Boston and must thereof — him to such proof thereof as the Commission may require.

Wherefore, said complaint should be dismissed,

First, for the reason that your Honorable Commission is without jurisdiction over the matter stated in said complaint, the same being within the sole jurisdiction of the Interstate Commerce Commission under the acts of Congress.

Second, for the reason that the United Telegram Company has no legal right to deliver the quotations of the New York Stock Exchange to any persons other than those approved by the New York Stock Exchange as provided in the contract hereto annexed and marked Exhibit "A."

Respectfully submitted,

UNITED TELEGRAM COMPANY.
C. F. PARKER, *President.*

On the twenty fifth day of July, A. D. 1916, the following Answer of the United Telegram Company, One of the Defendants, was filed:

23 *Answer of the United Telegram Company, One of the Defendants.*

(Filed July 25, 1916.)

And now comes the United Telegram Company and for answer admits the allegation in paragraph 1 of said bill of complaint.

2. And said defendant, the United Telegram Company, admits the allegations in paragraph 2 of said bill of complaint.

3. And said defendant, the United Telegram Company, admits the allegations in paragraph 3 of said bill of complaint.

4. And said defendant, the United Telegram Company, admits the allegations in paragraph 4 of said bill of complaint.

5. And said defendant, the United Telegram Company, admits the allegations in paragraph 5 of said bill of complaint.

6. And said defendant, the United Telegram Company, admits the allegations in paragraph 6 of said bill of complaint.

7. And said defendant, the United Telegram Company, admits the allegations in paragraph 7 of said bill of complaint.

8. And said defendant, the United Telegram Company, admits the allegations in paragraph 8 of said bill of complaint.

9. And said defendant, the United Telegram Company, admits the allegations in paragraph 9 of said bill of complaint.

10. And said defendant, the United Telegram Company, admits that it intends to and will comply with said Order of said Public Service Commission if and when said confirming order of said court, as set forth in said paragraph 10, becomes operative, and will, in obedience to said order, furnish to said Foster said continuous quotations, unless the operation of said confirming order is superseded and stayed by some order of said court.

11. And said defendant, the United Telegram Company, admits the allegations in paragraph 11 of said bill of complaint.

12. And said defendant, the United Telegram Company, admits the allegations in paragraph 12 of said bill of complaint.

UNITED TELEGRAM COMPANY,
By Its Attorney, ARTHUR LORD.

On the twenty seventh day of July, A. D. 1916, the following Answer of the Defendant, Calvin H. Foster, was filed:

24 *Answer of the Defendant Calvin H. Foster.*

(Filed July 27, 1916.)

Now comes the defendant, Calvin H. Foster, and in accordance with the rules of the Court governing defences in equity makes the following objections and answer to the plaintiff's Bill of Complaint:

(1) This defendant says that the Public Service Commission of the Commonwealth of Massachusetts as appears from the Bill of Complaint and the exhibits thereto annexed, was a party to the two proceedings instituted in the Supreme Court of the Commonwealth of Massachusetts which were brought to determine the validity of and to compel the enforcement of the said order of the said Public Service Commission, which it is the alleged purpose and object of this Bill to prevent the Telegram Company from complying with; that if such be the case this Honorable Court ought not and should not interfere with the enforcement of said order of the said Public Service Commission in the absence of said Commission as parties defendant to this Bill.

25

(2) That it appears from the allegations of the Bill of Complaint and the exhibits attached thereto that by suing out a writ of error and obtaining a supersedeas staying the enforcement of the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts on appeal to the Supreme Court of the United States that the plaintiff could obtain all the relief asked for by this Bill; that it appears by the allegations of the Bill and the exhibits attached thereto that the plaintiff has an absolute right to sue out such writ of error and to make application for such supersedeas; that the bill therefore shows upon its face that the defendant has a plain, complete and adequate remedy to protect its rights by availing itself of the above remedy and the Bill should therefore be dismissed in the absence of allegations showing that such remedy is not an available or adequate remedy for the plaintiff to now pursue in order to fully protect its rights.

(3) Under the allegations of the Bill and the exhibits attached thereto it conclusively appears that the plaintiff had an absolute right under the contract between it and the defendant Telegram Company to intervene in the suit which was instituted by the defendant, Foster, before the Public Service Commission of Massachusetts; and that the Plaintiff had an absolute right under said contract to take the defense of said suit out of the hands or
26 control of the said defendant Telegraph Company; that it appears by the allegations of the Bill and the exhibits attached thereto that the defendant Telegram Company was bound to notify the plaintiff of the institution of said suit as the said defendant Telegram Company was under the contract acting as the special agent and representative of the plaintiff for that special purpose in Massachusetts; that in the absence of an allegation to the contrary it will be presumed that the defendant Telegram Company in making defense to said suit did perform its obligations under the contract by giving to the plaintiff notice of said suit in accordance with the terms of said contract, in order that the plaintiff might appear and defend the said suit by itself and its own attorneys if it so choose to do, or to authorize the defendant Telegram Company to make the defense in its place as specifically provided for in said contract; if after receiving such notice the plaintiff did not appear and defend its rights when it had an opportunity having the right to do so as fully as the defendant Telegram Company had, then it is guilty of laches, and the Bill cannot be maintained, and must be dismissed on that ground as there is no allegation in the Bill that the plaintiff was not so notified and notice by the Telegram Company will be presumed to have been given in accordance with the contract.

(4) The Bill alleges that the defendant Telegram Company is about to violate its contract with the Exchange by furnishing the defendant Foster with the continuous quotations of the Ex-
27 change in obedience to the order of the Public Service Commission as confirmed by the decree of the Supreme Judicial Court; but it appears from the order itself and the decree of the Supreme Judicial Court that neither the said order nor said decree by its terms nor in substance compels the Telegram Company to furnish the defendant, Foster, with said continuous quotations. The defendant Telegram Company may fully comply with the specific and express terms of the order of the said Public Service Commission as confirmed by the said decree of the Supreme Judicial Court by refusing any longer to engage in the business of furnishing to its subscribers, continuous quotations of the Stock Exchange within the City of Boston, or elsewhere in this Commonwealth. It is further apparent from the specific provisions of the contract itself that so far as any rights of the Exchange under the contract are concerned, that the Telegram Company is under no obligation or duty to the Exchange to furnish or distribute its quotations to any person whatsoever after receiving them from the Exchange (its only duty in this respect being not to deliver them to persons procured by itself without first securing the approval of the Exchange). It thus becomes self-evident that no contract right of the plaintiff is

invaded should the Telegram Company obey the said order and decree by retiring from such business; and as the plaintiff's Bill can only be supported upon the theory that the order of the said Public Service Commission and the decree of the Supreme Judicial Court if complied with by the Telegram Company compels the Telegram Company to violate its contract, that the Bill should be dismissed.

28 (5) By the allegations of the Bill it is alleged that the furnishing and distributing of the quotations of the plaintiff Stock Exchange by the defendant Telegram Company to its subscribers in Boston is within the sole and exclusive jurisdiction of the Interstate Commerce Commission. If this assumption be true it can only be true upon the theory that the defendant Telegram Company in distributing the quotations in Boston is acting as a common carrier of messages in Interstate traffic for hire which said quotations as messages are sent by the plaintiff Stock Exchange as the sender to the various persons in Boston and in this Commonwealth receiving the same; if it be thus assumed therefore that the defendant Telegram Company is acting in the capacity of a common carrier of messages which are sent by the plaintiff as the sender, then in such case the contract annexed to the Bill of Complaint is absolutely void and illegal as it conclusively appears from the said contract that the payment of $9,000 per year by the defendant Telegram Company to the plaintiff Exchange would thereby constitute an illegal and unlawful payment, refund and rebate violating the provisions of Section 2, of the Act of February 4, 1887, Chapter 104, as amended by the Acts of June 18, 1910, Chapter 309. That the plaintiff can have no property rights in an illegal and void contract, and that this Honorable Court cannot enforce by its decree the alleged contract rights of the plaintiff.

(6) It is provided by the ninth paragraph of the contract between the defendant Telegram Company and the plaintiff Exchange that in case any difference or dispute shall arise between the parties

29 concerning the true intent, meaning or construction of anything contained in the contract or concerning any matter included within the spirit or scope thereof, or concerning the acts of omission of the Exchange or the Telegram Company in connection with the performance thereof, that all such matters and differences shall be submitted and referred to the award and determination of three arbitrators to be chosen one by the Exchange, another by the Telegram Company and the third by the two so chosen; and it is provided by said agreement that the award of any two such arbitrators shall be binding, and shall be carried out by the parties to said contract.

By the above agreement the plaintiff Stock Exchange cannot maintain the present suit against the Defendant Telegram Company without showing that it has offered to perform the said contract in accordance with the said agreement for arbitration; and in the absence of such allegations the Bill should be dismissed.

(7) That it appears from the allegations of the Bill and the contracts and other exhibits annexed thereto that the plaintiff claims the right to arbitrarily control the defendant Telegram Company in the furnishing and delivering of the quotations which under the

contract are the property of the said defendant Telegram Company; that it appears by said contract that as a condition precedent to any person receiving the said quotations from said Telegram Company that the said person must sign an application by the fifth clause of which the Telegraph Company is bound to forthwith discontinue the furnishing of said quotations whenever so directed to so do
30 by the plaintiff Stock Exchange; that the said contract between the said Exchange and the said Telegram Company is therefore void and illegal as unlawfully hampering and preventing the said Telegram Company from performing its duties as a Public Service Corporation by thereby permitting an illegal and unlawful discrimination against persons wishing said service, and that this Honorable Court will not enforce the provisions of such a contract.

(8) And the defendant pleads in bar of the pending suit the following facts to wit: That members of the Committee on Quotations of the plaintiff Stock Exchange accompanied by its counsel were present and appeared before the Public Service Commission of the Commonwealth of Massachusetts at a preliminary hearing which was held to discuss the future proceedings; after service of the complaint had been made upon the defendant Telegram Company and before the defendant Telegram Company had filed its answer; that the members of the said Quotation Committee of the plaintiff Exchange with their counsel were there for the purpose of determining what arrangements were to be made in regard to the procedure and trial of the said complaint of said Foster; that the said plaintiff Stock Exchange had notice and knowledge of the proceedings instituted by the defendant, Foster, before the Public Service Commission of Massachusetts, and had full opportunity and an absolute right under the contract relied on to intervene and defend the said suit and to take full control of the defense of said suit away from the defendant Telegram Company and to carry the same along by itself and its own attorneys if it saw fit; that said defendant
31 is now bound by the order of said Public Service Commission under the principles of the doctrine of Res Adjudicata; and that said order of the Public Service Commission as confirmed by the decree of the Supreme Judicial Court of the Commonwealth cannot be re-examined or collaterally attacked on the merits by the plaintiff in any Court of the United States without violating the provisions of Article four, Section one of the Constitution of the United States, except only by a writ of error and appeal direct to the Supreme Court of the United States. Wherefore from above facts your plaintiff says that the said order and decrees of the Judicial Tribunals of the Commonwealth of Massachusetts bar the plaintiff Exchange from maintaining this suit.

And this defendant further answering the plaintiff's Bill of Complaint on the merits says:—

Paragraph 1. As to the allegations of paragraph 1 of the plaintiff's Bill this defendant admits all the allegations therein stated except that this defendant denies that the members of the New York Stock Exchange gather daily on the floor of the Exchange for the purpose of buying and selling to each other certain corporate stocks, bonds and other securities which have been approved for trading purposes

by said Exchange. This defendant charges that very little of the business of the said New York Stock Exchange constitutes a transaction between the members of said Exchange other than in their capacity as agents and brokers for other persons who are not members of said Exchange, and that only a small proportion of the dealings in said Exchange is between the brokers thereof acting
32 as principals and not as agents.

Paragraph 2. As to the allegations in paragraph 2 of the plaintiff's Bill this defendant has no knowledge other than as stated by the Bill; that so far as the same are material the defendant calls upon the plaintiff to prove the same.

Paragraph 3. That as to the allegations in paragraph 3 this defendant says that the promptly acquired knowledge of the prices made from time to time on the floor of the New York Stock Exchange is of great value to the public generally and to the principals for whom said Stock Exchange members are buying and selling said stocks from time to time; that the said Exchange is a public market where for many years the public have resorted to purchase and sell securities of Public Service Corporations which are listed and traded in on said Exchange; as to the allegation in said paragraph concerning the amount of $42,000 alleged to be paid by said Exchange this defendant has no knowledge and leaves the plaintiff to prove the same; this defendant charges that the plaintiff Stock Exchange is in absolute control of the New York Quotation Company which delivers continuous quotations under a contract providing for a monopoly thereof in certain parts of New York which are identified and described in the contract annexed to the plaintiff's Bill of Complaint; that the control by the defendant of the New York Quotation Company is absolute and complete and is a large source of income to the said Exchange. As to the other allegations in said paragraph 3 this defendant has no knowledge and leaves the plaintiff to prove the same so far as they are material.

33 Paragraph 4. This defendant charges that the plaintiff Stock Exchange is more interested in procuring the revenue from the sale of the quotations to the Telegram Company than it is in stamping out bucket-shops; that the principal purpose and object which the plaintiff Stock Exchange had in mind in drawing the contract which it entered into with the United Telegram Company was to so control the continuous quotations of the said Exchange so as to procure a monopoly of all the trading in stocks, bonds and other securities for the members of said Exchange as well as to procure a revenue from the sale of said quotations; that in the report of the Hughes Commission referred to in said paragraph 5 the said Commission made the following report:

"It is unquestionable that only a small part of the transaction upon the Exchange is of an investment character; the substantial part may be characterized as virtually gambling."

That the members of the said New York Stock Exchange have been found guilty by the said Commission of manipulating prices, tak-

ing part in wash-sales and matched orders, and in fictitious trades, the latter being nothing more or less than purely bucketing the orders received from customers; the claim that the plaintiff Stock Exchange controls and uses its quotations for the purpose of wiping out bucket-shops is contradicted by the provisions of the contract itself whereby the said Exchange has parted with its right to control said quotations for the stipulated sum of $9,000 per annum to be paid by said defendant Telegraph Company.

34 Paragraph 5. As to the allegations of paragraph 5 this defendant says that the same are untrue so far as the allegations therein concern the reasons and object of the said Exchange in making said contract referred to in said paragraph; as to the other allegations the defendant denies the same and leaves the plaintiff to prove the same.

Paragraph 6. As to the allegations in paragraph 6 of the Bill of Complaint this defendant has no knowledge to the contrary and leaves the plaintiff to prove the same so far as the same are material.

Paragraph 7. This defendant denies that he ever had a careful or impartial investigation by the plaintiff Exchange before being refused the service which this defendant had applied for; and this defendant charges that the said Committee of the said Exchange had no sufficient or proper and competent evidence before it to justify the conclusion that this defendant desired to obtain the quotations for the purpose of conducting a bucket-shop or furnishing said quotations to others who were running bucket-shops; and all such charges as made in said paragraph 7 are untrue and false.

Paragraph 8. As to the allegations in paragraph 8 of the Bill of Complaint this defendant says that so far as the same are therein stated that the same appear to be true; but this defendant says that the plaintiff has omitted to state the fact that the said Exchange was represented at a preliminary hearing before the Public Service Commission by its members and their counsel prior to any hearing on the merits being held; that the plaintiff has also failed to

35 state that it actually intervened in the proceedings in the Supreme Judicial Court of the Commonwealth; that the said plaintiff Stock Exchange through its counsel filed a Brief attacking the validity of the order of the said Public Service Commission upon the same grounds that the said order has been attacked by the present Bill.

Paragraph 9. As to the allegations in paragraph 9 of the Bill of Complaint the defendant makes the following answer; That the quotations of the Exchange are delivered by the Exchange to the Telegram Company in New York City; that by delivery of the said quotations to the said defendant Telegram Company the said Exchange has performed all the duties that it has bound itself to perform under the said contract so far as the further distribution of said quotations is concerned; that the title to the said quotations as property passes to the said defendant Telegram Company in the City of New York where the said delivery is made by the Exchange; that thereafter the defendant Telegram Company sends the quotations from its own office in New York City to its main office in Bo

ton over ordinary Telegram wires in the Morse Code Telegraph Despatch form, the quotations being sent from New York City in the Morse Code form by the defendant Telegram Company as the sender to the said defendant Telegram Company as the receiver in Boston; that after the said quotations are received at the main offices of the defendant Telegram Company in Boston they are then translated by a telegraph operator in the Boston office of the Telegram Company so as to be easily read when delivered over the ticker service supplying the patrons with such service; that in order to
36 furnish the ticker service and deliver these quotations the Telegram Company maintains a system of telegraph wires, cables and conduits running through and under the streets of the City of Boston; that the privilege and franchise of operating and maintaining these wires, cables and conduits over and upon which the defendant Telegram Company transmits the quotations was procured by the said defendant Telegram Company in its capacity and character as a Public Service Corporation; that the said defendant Telegram Company has no right to operate, maintain or procure such franchise or privileges excepting for the public benefit; that the defendant Telegram Company could not furnish the continuous quotations of the New York Stock Exchange to its patrons in Boston as provided for in said contract without using its wires, cables and conduits running under and through the streets of Boston, and except without obtaining such privilege and franchise solely in its capacity as a Public Service Corporation; that the plaintiff Stock Exchange has no contractual relation direct or indirect with any of the subscribers in Boston to whom this defendant Telegram Company furnishes such service; that the said plaintiff Stock Exchange sends no messages or quotations as messages to any person in the City of Boston; that the sending of the quotations in Morse Code Telegraph Despatch form between Boston and New York is Interstate Commerce, but that the Interstate transmission of the said quotation ends upon the receipt by the defendant Telegram Company of the said quotations in the Morse Code form at its offices in Boston; that everything thereafter done by the said Telegram Company
37 in delivering the said quotations as alleged by the 9th paragraph of the plaintiff's Bill or as stated in this paragraph of the defendant's Answer is purely an Intrastate transaction and is in no way subject to the Federal statutes regulating transmissions of Interstate messages by Telegram Companies as common carriers thereof; that it is within the police power of the Commonwealth of Massachusetts to regulate the distribution of the said quotations within the City of Boston, and that the provisions of Chapter 784 of the Acts of 1913 under which the order of the Public Service Commission was authorized to be entered and made are perfectly legal and in no way in conflict with the constitution or statutes of the United States.

Paragraph 10. As to the tenth paragraph of the Bill of Complaint this defendant charges that the said defendant Telegram Company and the said plaintiff Stock Exchange are in collusion and in the conspiracy to procure by this Bill of Complaint a re-trial by this

Court of the issues that were determined in the Massachusetts Courts between the parties to said proceedings, and this defendant charges that the defendant Telegram Company is now acting and co-operating with the plaintiff so as to aid and assist the plaintiff in preventing this defendant from obtaining the benefit of the order of the said Commission, and the decree of the Supreme Judicial Court of Massachusetts, and that the said defendant Telegram Company has no intent whatever to act except as it is requested and directed to act by the plaintiff as provided for by the said contract.

Paragraph 11. As to the allegations in paragraph 11 of the plaintiff's Bill of Complaint so far as they state conclusions of
38 law, this defendant denies the same and this defendant states that all the orders and decrees and statutes under which said orders and decrees were issued are perfectly legal and valid and in no way violating any rights that the plaintiff Stock Exchange has secured by the constitution of the United States.

P. H. KELLEY,
J. L. McLEAN,
Attorneys for Calvin H. Foster.

On the third day of August, A. D. 1916, the following Order as to Parties Defendant was entered:

39 *Order.*

August 3, 1916.

DODGE, *J.:*

The motion of the complainant that this cause be set down for argument as a motion upon the objection raised by the answer of the defendant Foster that the complaint is defective for the reason that the Public Service Commission of the Commonwealth of Massachusetts has not been made a party defendant to the bill, and the motion of the complainant that said objection be overruled coming on for argument, and the Court having heard the argument of counsel for the complainant and the defendant Foster upon said motion, thereupon, after due hearing,

It is ordered, adjudged, and decreed that said objection is well taken, and that Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts should be made parties defendant to the bill; and thereupon the complainant moves the Court for leave to amend its bill by making the said Frederick J. MacLeod and others in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts parties defendant, and it is ordered that said leave be given.

40 It is further ordered that the Clerk forthwith issue a subpoena of the United States directed to the said Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney,

and Charles A. Russell, in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts, commanding them on a day certain to appear and answer the bill, and to abide by and perform such decree as may be entered by this Court.

By the Court:

FRANK H. MASON,
Deputy Clerk.

On the said third day of August, A. D. 1916, the following Amendment to Bill of Complaint was filed by leave of court:

41 *Amendment to the Bill of Complaint.*

(Filed by Leave of Court August 3, 1916.)

Now comes the complainant, by leave of Court, and files the following amendment to his bill of complaint:—

(1) Insert in the opening paragraph of said bill, immediately before the words "and alleges upon information," the words—Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts—.

(2) Insert in the first paragraph of the prayer of said bill, immediately after the words "Calvin H. Foster," the words—and Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts—.

(3) Insert in the prayer for process, immediately after the words "Calvin H. Foster," the words—and Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, in their capacity as members of the Public Service Commission of the Commonwealth of Massachusetts—.

HENRY G. S. NOBLE, *Complainant.*
By WALTER F. TAYLOR,
HENRY S. ROBBINS,
HENRY L. SHATTUCK,
Of Counsel.

42 On the twenty third day of August, A. D. 1916, the following Answer of Members of Public Service Commission, Respondents, was filed:

Answer of Members of Public Service Commission, Respondents.

(Filed August 23, 1916.)

And now come the members of the Massachusetts Public Service Commission, summoned as respondents, without waiving their motion to order certain documents filed, or their motion to strike out

portions of the complainant's bill, or their motion to dismiss, but especially insisting thereon as fully as though incorporated verbatim herein, and for answer say:—

1. The matters alleged in paragraph 1 are not within their personal knowledge and, therefore, they deny the same.

2. The matters alleged in paragraph 2 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

3. The matters alleged in paragraph 3 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

4. The matters alleged in paragraph 4 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

5. The matters alleged in paragraph 5 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

6. The matters alleged in paragraph 6 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

43 7. The matters alleged in paragraph 7 of the bill of complaint are not within their personal knowledge and, therefore, they deny the same.

8. These respondents admit the allegations of paragraph 8 of the bill of complaint, except that they deny that the terms of the order of the Public Service Commission or of the prayer of their bill of complaint in the Massachusetts Supreme Court or of the decree of the Massachusetts Supreme Court are correctly summarized or set forth, and call upon the complainant to produce accurate and complete copies thereof. They further deny that on the fifteenth day of April, 1915, they filed in the Massachusetts Supreme Court a bill of complaint, as alleged in said paragraph, but say that they did file such a bill on the fifteenth day of October, 1915.

9. For the purposes of this suit they admit the allegations of paragraph 9 of the bill of complaint, except as qualified by the allegations herein made. And further answering, they say that the information or quotations received by the United Telegram Company as its property in New York are transmitted by the Postal Telegraph Company to the United Telegram Company in Boston in the Morse Code, and at or after receipt in Boston the same are translated and then transmitted by employees of the United Telegram Company by ticker instruments in ordinary letters and figures from the office of the United Telegram Company in Boston to individuals and persons receiving the same, all within the Commonwealth of Massachusetts. Such transmission is made, and can only be made, by the use of wires passing under, along and through public streets and highways under franchises granted directly or indirectly by the Commonwealth of Massachusetts and subject to its control and regulation that such transmission does not constitute in any way the sending or transmission of a message, nor is it an act with reference to

44 which the Congress of the United States has in any way legislated or regulated in a manner inconsistent with or so as to prevent such regulation by the Commonwealth of Massachusetts as has taken place or been specifically applied in the present case.

10. These respondents deny the allegations of paragraph 10.

11. These respondents deny the allegations of paragraph 11.

12. These respondents deny the allegations of paragraph numbered 13.

14. And further answering, these respondents allege in bar of these proceedings that the Act of the Legislature of Massachusetts (St. 1913, c. 784) and acts in amendment thereof and addition thereto, confer upon these respondents no power or authority directly to enforce any order made by them, but that such enforcement must be and is obtained by application to the courts of the Commonwealth of Massachusetts; that a bill in equity was filed by them October 15, 1915, seeking to enforce the following order entered by them:

"Order.

"It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

Ordered, That the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination."

That upon such bill a final decree was entered by the Supreme Judicial Court of Massachusetts, enjoining the Western Union Telegraph Company forthwith to comply with the aforesaid order of the Public Service Commission. The Western Union Telegraph
45 Company has filed a petition for a writ of error to the Supreme Court of the United States with the Chief Justice of said Supreme Judicial Court, upon which petition an order has been made superseding said final decree and suspending its operation pending decision upon said writ of error by the Supreme Court of the United States; that no other action to enforce said order has been taken by these respondents or threatened to be taken by them. Under the terms of the contract between the New York Stock Exchange and the United Telegram Company annexed to the complainant's bill of complaint the New York Stock Exchange has a right to intervene in any suit such as was brought by these resopndents against the United Telegram Company, as hereinbefore alleged, and it has the right to intervene and be heard upon said writ of error, and in fact did file a brief in said suit with the Supreme Judicial Court of Massachusetts.

15. These respondents further say that certain persons, members of the New York Stock Exchange, who are real parties in interest

herein, are citizens and residents of the District of New Jersey and certain others are citizens and residents of the District of Massachusetts and accordingly this court does not have jurisdiction of this proceeding.

16. The United Telegram Company is a public service corporation engaged in the business of transmitting intelligence by electricity, by means of telephone and telegraph lines and other methods or systems of communication and of conveniences, appliances, instrumentalities and equipment utilized in connection therewith or appertaining thereto, and all provisions of the contract alleged and relied upon in the complainant's bill which tend to compel said company to discriminate between members of the public or to prevent it from furnishing to all persons such services as it renders to
46 any, and especially the provision thereof limiting the right of said United Telegram Company to furnish quotations only to such persons as may be approved by the New York Stock Exchange are illegal and void.

17. The United Telegram Company is a public service corporation and a telegraph company engaged in sending messages from one state, territory or district of the United States to other states, territories and districts of the United States and a common carrier within the meaning and subject to the provision of the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended. As such common carrier said telegraph company makes and collects substantial charges for all messages transmitted in behalf of large numbers of and in fact practically all persons, and allows to such persons no rebate from such charges. If the transaction contemplated by and provided for in the existing contract between the complainant and said telegraph company consitutes the sending of a message or messages within the terms of said act, as alleged or implied by the complainant's bill, which these respondents deny, then the terms of said contract call for and attempt to create an undue and unreasonable preference or advantage to the complainant, the New York Stock Exchange and the members thereof, and calls for and attempts to create an unlawful discrimination in favor of the complainant and others contrary to the terms of section 3 of said act.

Wherefore, these respondents pray that the complainant's bill of complaint be dismissed, and for their costs.

By Their Attorney, H. WARE BARNUM,
Assistant Attorney-General.

On the said twenty third day of August, A. D. 1916, the following Motion to Dismiss was filed:

47 Copy.

Motion of Public Service Commission to Dismiss.

(Filed August 23, 1916.)

And now come the members of the Massachusetts Public Service Commission, summoned as respondents in this suit, and move that the complainant's bill of complaint be dismissed for the following reasons:

1. The district in which the complainant resides is not stated nor his citizenship averred.

2. It appears from the bill of complaint that the rights therein asserted belong to an association or partnership and neither the names of the actual owners of the rights sought to be enforced nor the citizenship and residence of such persons are stated.

3. No valid authority for the complainant to prosecute this proceeding without making all owners of the rights sought to be enforced parties or disclosing their residence and citizenship is alleged, since the statute of the State of New York referred to cannot authorize suit in the District of Massachusetts.

4. The districts in which the true parties complainant reside are not stated, and if the same were stated it would appear that this court has no jurisdiction on the ground of diversity of citizenship.

5. This court has no jurisdiction of this proceeding. It does not appear that jurisdiction exists on the ground of diversity of citizenship, and no federal question is properly raised.

48 6. If any matter of interstate commerce is involved, as alleged in the complainant's bill, the contract annexed to the complainant's bill of complaint, on which the complainant's rights are based, is illegal and void because it calls for and creates, contrary to the provisions of the Interstate Commerce Act, and especially of the Act to Regulate Commerce, approved February 4, 1887, section 3, an unlawful discrimination in favor of the complainant or complainants, and a court of equity will not enforce such a contract.

7. It appears that no right of the complainant has been infringed or threatened by these respondents, or by any act of theirs.

By their attorney:

H. WARE BARNUM,
Assistant Attorney-General.

On the twelfth day of September, A. D. 1916, the following Stipulation was filed:

49 *Stipulation Incorporating Certain Documents in the Bill.*

(Filed September 12, 1916.)

It is stipulated by the parties in the above entitled cause that the copy of the order of the Public Service Commission of Massachu-

setts dated September 7, 1915, as set out in the answer of said Public Service Commission in this case, is a correct copy of said order, and for the purposes of the motions filed herein by said Public Service Commission, may be considered a part of complainant's bill.

It is further stipulated that the annexed copy of the decree of the Supreme Judicial Court of Massachusetts, in the case of Macleod et al. v. Western Union Telegraph Company and The United Telegram Company, is a correct copy of said decree, and for the purposes of said motions filed herein by said Public Service Commission, may likewise be considered a part of complainant's bill.

HENRY G. S. NOBLE, *Complainant,*
ROPES, GRAY, BOYDEN & PERKINS,
By HENRY S. ROBBINS,
Attorneys.
THE UNITED TELEGRAM COMPANY,
By ARTHUR LORD, *Attorney.*
CALVIN H. FOSTER,
By P. H. KELLEY, *Attorney.*
PUBLIC SERVICE COMMISSION OF MASSACHUSETTS,
By H. WARE BARNUM,
Asst. Attorney General of Mass.

50 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 24561.

FREDERICK J. MACLEOD et al.

v.

THE WESTERN UNION TELEGRAPH COMPANY and THE UNITED TELEGRAM COMPANY.

Final Decree.

This case came on to be heard after rescript from the full bench, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the respondents, The Western Union Telegraph Company and The United Telegram Company, be commanded and enjoined forthwith to comply with the following order of the Public Service Commission:

Order of Public Service Commission.

It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company, have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York

Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

Ordered, That the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company, shall forthwith remove said discrimination.

By the Court:

JOHN F. CRONIN, *Clerk.*

June 30, 1916.

51 On the fifth day of February, A. D. 1917, the following Final Decree is entered:

Final Decree.

On Motion to Dismiss Filed by Massachusetts Public Service Commission.

February 5, 1917.

DODGE, *J.:*

This cause came on to be heard at this term upon the motion to dismiss filed by Massachusetts Public Service Commission and said motion was argued by counsel, and upon consideration of the bill of complaint and motion to dismiss but without the submission of evidence or further hearing of the parties; the court being of the opinion that it is without jurisdiction of said cause as to any of said defendants and also that, even if this court has jurisdiction, the bill does not state a case entitling the complainant to the relief prayed for.

It is ordered, adjudged and decreed that the motion to dismiss filed by the Massachusetts Public Service Commission be allowed, and that the bill of complaint be dismissed, as to all the defendants for want of jurisdiction and also for want of equity appearing in the bill.

By the Court:

JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing Final Decree, the plaintiff claims an appeal to the Supreme Court of the United States and gives good and sufficient security that he will prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good; and said appeal is allowed accordingly.

52 *Opinion.*

On Motion to Dismiss, Filed Aug. 23, 1916, by Massachusetts Public Service Commission.

December 19, 1916.

DODGE, *J.*:

The bill and motion to dismiss the same in this case are in all respects similar to those in No. 738 Equity wherein an opinion is this day filed. The two cases were heard together and what is said in the opinion referred to applies to the present case as well.

The motion is therefore granted and there may be a decree dismissing the bill.

53 *Plaintiff's Petition for Appeal.*

(Filed February 5, 1917.)

The above named complainant, conceiving himself to be aggrieved by the decree of this court, entered on the — day of February, 1917, dismissing the above entitled suit, hereby appeals from said decree to the Supreme Court of the United States, for the reasons specified in the assignments of error this day filed herein, and prays that this appeal may be allowed, and that a transcript of the record and all proceedings herein may be forthwith transmitted to said Supreme Court.

HENRY G. S. NOBLE,
By HENRY S. ROBBINS,
WALTER F. TAYLOR,
HENRY L. SHATTUCK,
His Solicitors.

54 *Plaintiff's Assignments of Error.*

(Filed February 5, 1917.)

Now comes the complainant, and files the following assignments of error, for grounds of reversal on appeal in the above entitled cause:

1. That the District Court erred in dismissing said cause for want of jurisdiction.

2. That the District Court erred in not retaining jurisdiction thereof and proceeding to a hearing of the merits thereof.

3. That the District Court erred in not entering a decree on the merits, adjudging the statute of Massachusetts, so far as it attempts to confer power upon the Public Service Commission of Massachusetts, to make or enforce its said order of September 7, 1915, or any other order directing the Western Union Telegraph Company

to furnish the said quotations to said Calvin H. Foster, contrary to the Constitution of the United States and void.

4. That said District Court erred in not entering a decree upon the merits, adjudging that said order of said Public Service Commission, entered on the 7th day of September, 1915, directing said Western Union Telegraph Company to furnish said Foster said quotations, did not constitute any reason or excuse why said
55 Western Union Telegraph Company should not, as respects said Foster, comply with said contract with said Stock Exchange.

5. That said District Court erred in not entering a final decree in said cause, permanently restraining the said Western Union Telegraph Company from delivering to said Foster, and said Foster from receiving from said Western Union Telegraph Company said continuous quotations of said Stock Exchange until said Foster shall have first lawfully acquired the right to receive said quotations either by contract or purchase from said Stock Exchange, or with its consent or approval, from some telegraph company authorized by said Stock Exchange to distribute said quotations.

6. That the said District Court erred in not retaining said cause for a hearing upon the merits and in not entering a decree for complainant pursuant to the prayer of said bill.

7. That said Court erred in dismissing said bill for want of equity.

HENRY G. S. NOBLE,
By HENRY S. ROBBINS,
WALTER F. TAYLOR,
HENRY L. SHATTUCK,
His Solicitors.

56 *Bond on Appeal.*

(Filed and Approved February 5, 1917.)

Know all men by these presents, that we, Henry G. S. Noble as President of the New York Stock Exchange, as Principal and the National Surety Company, a New York corporation as Surety, are held and firmly bound unto United Telegram Co., Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the Public Service Commission of the State of Massachusetts, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said United Telegram Co., Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our Seals, and dated this 5th day of February, A. D. 1917.

Whereas, lately, at the December Term, A. D. 1916, of the Dis-

trict Court of the United States, for the District of Massachusetts, in a suit pending in said court between said Henry G. S. Noble as President of the New York Stock Exchange, as complainant, and the United Telegram Co., Calvin H. Foster and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman and John F. Meaney, and Charles A. Russell, constituting said Public Service Commission of Massachusetts, as defendants, a decree was entered on the 5th day of February, 1917, dismissing said bill, and the said Henry G. S. Noble as President of the New York Stock Exchange has obtained an order of appeal of said court to reverse the decree in the aforesaid suit, and a citation directed to the s id United Telegram Co., Calvin H. Foster, and Frederick J. Macleod, Everett E. Stone, Joseph B. Eastman, John F. Meaney, and Charles A. Russell, constituting the said Public Service Commission of Massachusetts, citing and admonishing them to be and appear in the Supreme Court of the United States, within thirty (30) days from and after the date of said citation:

57 Now, the conditions of the above obligation are such, that if the said Henry G. S. Noble as President of the New York Stock Exchange shall duly prosecute his said appeal with effect, and answer all damages and costs, if he shall fail to make good his plea, then the above obligation to be void, else to remain in full force and effect.

HENRY G. S. NOBLE. [SEAL.]
NATIONAL SURETY COMPANY, [SEAL.]
By JOHN A. CURRAN, *Resident Vice President.*

Attest:
COLLINS GRAHAM,
Resident Assistant Secretary.

Feb. 5, 1917.

Bond approved:
FREDERIC DODGE,
United States Circuit Judge.

STATE OF NEW YORK,
City and County of New York, ss:

On this second day of February, 1917, personally appeared before me Henry G. S. Noble, to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

GEORGE W. MULLER, [SEAL.]
Notary Public, Kings County.

Certificate filed in New York County. Kings County Register's No. 8125. Kings County Clerk's No. 143. New York County Register's No. 8321. New York County Clerk's No. 382.

58 *Order Allowing Appeal.*

February 5, 1917.

DODGE, *J.:*

Now comes the complainant, and it appearing to the court that a petition for appeal and assignments of error have been filed herein:

It is Ordered that an appeal to the Supreme Court of the United States, from the decree entered herein on the 5th day of February, 1917, be, and the same is, allowed, and that for the purpose of enabling said court to decide said appeal, a transcript of the record herein be forthwith transmitted to said court, and that complainant file his appeal bond in the sum of $500, with surety to be approved by this court, and this court, contemporaneously with the entry of this order files a certificate respecting jurisdiction as contemplated by Section 238 of the Act of Congress.

By the Court:

JOHN E. GILMAN, JR.,
Deputy Clerk.

59 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United Telegram Company, a corporation organized and existing under the laws of the State of New Jersey, doing business in the District of Massachusetts, and Calvin H. Foster, a citizen and resident of the State and District of Massachusetts; Frederick J. MacLeod, Everett E. Stone, Joseph B. Eastman, John F. Meaney and Charles A. Russell, as members of the Public Service Commission of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the seventh day of March next, pursuant to an Appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Henry G. S. Noble, President of the New York Stock Exchange, a voluntary unincorporated association, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederick Dodge, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts this fifth day of February, in the year of our Lord one thousand nine hundred and seventeen.

FREDERIC DODGE,
United States Circuit Judge.

60 *Acknowledgments of Service on Citation on Appeal.*

Boston, Feb. 13, 1917.

I hereby accept service of the within citation for Calvin H. Foster.

P. H. KELLEY.

Service of the within Citation is hereby accepted for the within named memebers of the Mass. Public Service Commission.

H. WARE BARNUM,
Asst. Attorney General.

Service of the within citation is hereby accepted by the United Telegram Company.

ARTHUR LORD.

61 *Certificate of Question of Jurisdiction.*

(Filed February 6, 1917.)

UNITED STATES OF AMERICA,
District of Massachusetts:

District Court.

HENRY G. S. NOBLE
v.
UNITED TELEGRAM COMPANY et al.

In pursuance of Section 238 of the Judicial Code this court certifies to the Supreme Court the following question of jurisdiction in the above entitled case:

Whether the bill in this case presents a controversy which arises under the Constitution or laws of the United States within the meaning of Section 24 of the Judicial Code.

FREDERIC DODGE,
U. S. Circuit Judge.

62 *Præcipe.*

(Filed February 13, 1917.)

Now comes the appellant, the complainant in the above entitled action, and requests that the following portion of the record may be incorporated in the transcript on appeal:

Bill of complaint, filed July 6, 1916.
Answer of the defendant, Calvin H. Foster.
Answer of the defendant, United Telegram Co.

Answer of members of the Public Service Commission.
Order entered August 3, 1916.
Amendment to bill of complaint, filed August 3, 1916.
Motion to dismiss, filed August 23, 1916.
Stipulation, filed September 12, 1916.
Opinion of Dodge, J., filed Dec. 19, 1916, on motion to dismiss.
Decree on motion to dismiss, entered Feb. 5, 1917.
Complainant's petition for Appeal, filed Feb. 5, 1917.
Complainant's assignment of errors, filed Feb. 5, 1917.
Order on petition for appeal, entered Feb. 5, 1917.
Certification to the Supreme Judicial Court, filed February 5, 1917.
Bond on Appeal.
Præcipe.

By His Attorneys,
ROPES, GRAY, BOYDEN & PERKINS.
HENRY L. SHATTUCK.

Assented to and adopted:
P. H. KELLEY,
Attorney for Calvin H. Foster.
H. WARE BARNUM,
Asst. Atty. Gen'l. for Members of Mass. Public Service Commission.
ARTHUR LORD,
For United Telegram Co.

63 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is the record agreed upon by the parties as the appeal record in the cause in equity entitled, No. 739, Henry G. S. Noble, Plaintiff, v. The United Telegram Company et al., Defendants, in said District Court determined, together with the original Citation issued upon the appeal of the plaintiff in said cause, with the Acknowledgments of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twenty-third day of February, A. D. 1917.

[Seal of the District Court, Massachusetts.]

WILLIAM NELSON, *Clerk.*

Endorsed on cover: File No. 25,792. Massachusetts D. C. U. S. Term No. 420. Henry G. S. Noble, as President of the New York Stock Exchange, appellant, vs. The United Telegram Company, Calvin H. Foster et al. Filed February 28th, 1917. File No. 25,792.

3

Supreme Court, U. S.
FILED
APR 10 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

HENRY G. S. NOBLE,
vs.
WESTERN UNION TELEGRAPH COMPANY, et al.

No. [redacted] 41

HENRY G. S. NOBLE,
vs.
UNITED TELEGRAM COMPANY, et al.

No. [redacted] 42

MOTIONS TO ADVANCE.

HENRY S. ROBBINS,
WALTER F. TAYLOR,
Counsel for Appellant.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

HENRY G. S. NOBLE, *vs.* WESTERN UNION TELEGRAPH COMPANY, et al.	No. 961.
HENRY G. S. NOBLE, *vs.* UNITED TELEGRAM COMPANY, et al.	No. 962.

MOTIONS TO ADVANCE.

The appellant in the two above entitled causes moves the court to advance said two causes and set them down for hearing and argument with the cases of *Western Union Telegraph Company, Plaintiff in Error* v. *Calvin H. Foster et al.,* No. 680, October Term, 1916, and *Western Union Telegraph Company* v. *Frederick J. MacLeod et al.,* No. 681, October Term, 1916.

The grounds of this motion are, that all of said four cases originate out of an effort of Calvin H. Foster to compel said telegraph companies to

furnish to said Foster, at his office in the City of Boston, by means of a ticker, the market quotations of the New York Stock Exchange; and that all of said four cases involve one common question, which is the main question of law in each case, said question being—whether the gathering of quotations of the New York Stock Exchange in New York City, and their telegraphic transmission to the City of Boston and their re-distribution there by the said telegraph companies upon tickers placed in the offices of persons desiring said quotations in Boston, constitute interstate commerce, and if so whether a statute of Massachusetts, which attempts to regulate the distribution of said quotations, and under which the Public Service Commission of Massachusetts has ordered these telegraph companies to furnish these quotations to said Foster, violates the Constitution of the United States.

Further facts, upon which this motion is based, are set out in the affidavit hereto attached and made a part of this motion.

HENRY S. ROBBINS,
WALTER F. TAYLOR,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1916.

Henry G. S. Noble,
vs.
Western Union Telegraph Company *et al.* } No. 961.

Henry G. S. Noble,
vs.
United Telegram Company *et al.* } No. 962.

To P. H. Kelley, Esq., Solicitor for Calvin H. Foster, H. Ware Barnum, Esq., Solicitor for Frederick J. MacLeod et al., constituting the Public Service Commission of Massachusetts; Arthur Lord, Esq., Solicitor for Western Union Telegraph Company and United Telegram Company:

Please take notice that on the 16th day of April, 1917, at 12:00 o'clock M., or as soon thereafter as counsel can be heard, we shall submit to the Supreme Court of the United States, at its court room in the City of Washington, a written motion to advance the above causes and an affidavit of Mr. Henry S. Robbins in support thereof, copies of which motion and affidavit are herewith served upon you; at which time and place you may appear if you see fit.

HENRY S. ROBBINS,
WALTER F. TAYLOR,
Counsel for Appellant.

The undersigned hereby acknowledge receipt and due service of the foregoing notice and of a copy of motion and affidavit therein mentioned, this ..... day of March, 1917.

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The undersigned consent to the granting of said motion.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1916.

Henry G. S. Noble,
vs.
Western Union Telegraph Company *et al.* } No. 961.

Henry G. S. Noble,
vs.
United Telegram Company *et al.* } No. 962.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
EASTERN DIVISION,

Henry S. Robbins, being duly sworn, says:

That he is one of the counsel for appellant in the two above entitled causes:

That Calvin H. Foster instituted before the Public Service Commission of Massachusetts a proceeding against the Western Union Telegraph Company and the United Telegram Company to compel them to furnish to him the market quotations of the New York Stock Exchange upon tickers to be placed in his office in Boston; that said Public Service Commission entered an order in favor of said Foster; and that thereupon the members of said Public Service Commission filed in the Supreme Court of Massachusetts, pursuant to a statute of said state, a bill or petition praying that said telegraph companies be required to comply with said order, and said telegraph companies also filed, pursuant to said statute, their bills or petitions seeking to annul or set aside said order; that said several petitions were, under the

practice of said state, certified to the full bench of said Supreme Court, which entered an order or judgment refusing to set aside said order and requiring said telegraph companies to comply therewith; that thereupon said telegraph companies prosecuted their writs of error to bring said causes to this court, and the same have been docketed, and are now pending, in this court as Nos. 680 and 681, October Term, 1916:

That thereafter said Henry G. S. Noble, as the president of the New York Stock Exchange, filed in the District Court of the United States for the District of Massachusetts his two bills in equity, one seeking to enjoin said Western Union Telegraph Company, and one seeking to enjoin said United Telegram Company, from furnishing the quotations of said New York Stock Exchange to said Foster, as ordered to do by said Public Service Commission: that said District Court thereafter dismissed said bills for want of jurisdiction, and also for want of equity, and that thereupon said Noble perfected appeals to this court from said decrees, which have been docketed, and are now pending, in this court as Nos. 961 and 962, October Term, 1916:

That said proceedings before said Public Service Commission were based upon a statute of the state of Massachusetts creating said Public Service Commission, and conferring upon it certain jurisdiction and power over public service corporations, including telegraph companies transacting business in Massachusetts, and it was claimed by said Foster—and said Commission and said Supreme Court of the State of Massachusetts decided—that said statute conferred on said Commission jurisdiction and

power to regulate, within the State of Massachusetts, the distribution of the market quotations of the New York Stock Exchange as the same then were and are distributed:

That said quotations are furnished by said Stock Exchange to said two telegraph companies under written contracts, in which said two telegraph companies agreed not to furnish said quotations to any person or firm not approved by said Stock Exchange; and said two suits by said Noble in said District Court were for the purpose of enforcing compliance by said telegraph companies with said contracts, notwithstanding said order of said Public Service Commission; and that there is one question of law, common to all of said four cases, and is the principal question of law in each of them—that question being, whether the collection of said quotations in the city of New York, and their transmission telegraphically to Boston, and their re-distribution there by said telegraph companies upon ticker systems, does not constitute interstate commerce, and whether, by reason thereof, said statute of Massachusetts does not violate the Constitution of the United States:

That this affiant verily believes that it will promote the convenience of this court, and all of the counsel in said four cases, to have all of said cases heard and argued at the same time, and to this end to have said Cases Nos. 961 and 962 advanced to be heard with causes Nos. 680 and 681:

That in all said cases or proceedings P. H. Kelley, Esq., is the counsel for said Calvin H. Foster: H. Ware Barnum, Esq., Assistant Attorney General of

the State of Massachusetts, is counsel for the members of said Public Service Commission; and Arthur Lord, Esq., is counsel for said Western Union Telegraph Company and said United Telegram Company; and the parties above named (with said Noble) constitute all the parties to the said four causes.

HENRY S. ROBBINS.

Subscribed and sworn to before me this 24th day of March, A. D. 1917.

A. C. HEROY,
Notary Public.

(Notarial Seal)

4

Office Supreme Court, U. S.
FILED
MAR 2 1918
JAMES D. MAHER,
CLERK.

No. 419.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

HENRY G. S. NOBLE, as President of the New York Stock Exchange,
Appellant,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, CALVIN H. FOSTER, and the Members of the Public Service Commission of Massachusetts,
Appellees.

BRIEF FOR APPELLANT.

WALTER F. TAYLOR,
COUNSEL.

HENRY S. ROBBINS,
FOR APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

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STATEMENT OF THE CASE 1-8

This is an appeal from a decree of a District Court dismissing, for want of jurisdiction (because of the absence of a Federal question) and for want of equity, a bill filed by the New York Stock Exchange to prevent the enforcement of an order of the Public Service Commission of Massachusetts, requiring the appellee telegraph company to furnish the Stock quotations to appellee Foster in violation of the telegraph company's contract with the Exchange.

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There has been no legislative action impressing these quotations with a public use 51

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1917.

HENRY G. S. NOBLE, as President of the New York Stock Exchange,
Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, CALVIN H. FOSTER, et al.,
Appellees.

No. 419.

BRIEF FOR APPELLANT.

STATEMENT.

This is a suit by the New York Stock Exchange in the name of its president—it being an unincorporated association—to prevent the misuse of its market quotations; and this appeal raises the questions

(1) whether the bill presents a controversy under the constitution or laws of the United States within the meaning of Sec. 24 of the Judicial Code—and if jurisdiction thus exists,

(2) whether upon this record appellant is now entitled to a decree upon the merits.

This is not the first case of its kind coming to

this court. Some years ago the Chicago Board of Trade devised, and put into execution, a plan to prevent the use of its market quotations in bucket shops, which received the approval of this court in *Board of Trade* v. *Christie*, 198 U. S., 236.

Later, the New York Cotton Exchange adopted the same plan, which again came before this court in *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322.

The Hon. Charles E. Hughes, while Governor of New York, appointed a commission to inquire into the subject of speculation in securities, and that commission—doubtless having in mind the Chicago Board of Trade plan—recommended that the New York Stock Exchange take steps to prevent the misuse of its quotations in bucket shops.

In conformity with this recommendation the Stock Exchange in September, 1914, terminated its existing contract with the telegraph companies distributing its quotations, and entered into a new contract with the Western Union Telegraph Company, substantially like the contracts between the exchanges and the telegraph companies involved in the *Christie* and *Hunt* cases.

All these contracts rest upon the principle that the market quotations of an exchange are its property, and that, so long as they are furnished only to persons who contract to use them in their own business and confine them to their own offices, the exchange does not thereby lose its property right in, or control over, such quotations; and this legal principle was affirmed by this court in the *Christie* and

the *Hunt* cases. (For form of applicant's contract, see Rec., pp. 3 to 5.)

These cases also sustain the right of the exchange to protect its right in its quotations by injunctions against those who seek to invade it, and decide that this right is not affected by the communication of the quotations under the contracts above referred to.

The bill in the present case does not (except as hereinafter stated) materially differ from the bills in the *Christie* and *Hunt* cases. In each the distributing telegraph company and the person seeking to get (or retain) the quotations were made defendants. To prevent this the ultimate relief sought in each case was an injunction. In those cases the bills sought injunctions against persons who had not signed the required application; whereas, appellee Foster signed such application, but the Stock Exchange rejected it because, as stated in the bill, (Rec., p. 6), as a result of a careful and impartial hearing by one of its committees (in which Foster participated), the Exchange has found, that Foster had been for a number of years engaged in conducting bucket-shops, and the Exchange is informed and believes that Foster desires these quotations either to use in conducting a bucket-shop or sell to persons who are conducting bucket-shops and desire to so use these quotations, and for this reason the Exchange had disapproved his application.

There is, however, in the present case a new feature arising out of the following circumstances (although in the *Hunt* case there was a state court injunction suit which presented one of the questions arising here):

After the Telegraph Company, by reason of the disapproval of the Exchange, had refused appellee Foster a ticker, he filed a complaint before the Public Service Commission of Massachusetts, setting up such application and refusal (Rec., p. 35), to which, upon being duly served, the Telegraph Company filed an answer alleging that the Commission was without jurisdiction, because the transmission of the quotations from New York to the tickers in the offices of the customers in Boston was interstate commerce, and also because under its contract with the Exchange it could not give Foster a ticker until the Exchange had approved his application (Rec., p. 35). As a result of a hearing before the Commission in this proceeding, *to which the Stock Exchange was not a party*, the Commission entered an order (Rec., p. 50) finding that the Telegraph company's refusal to furnish the ticker was "unjust and unlawful discrimination" and ordering it to "forthwith remove said discrimination."

Under the state practice the Public Service Commission and the Telegraph Company both applied to the state court; the former to secure the enforcement of its order, and the latter to have the order annulled; and the questions thus raised being reserved to the Supreme Court of Massachusetts sitting *en banc*, that court sustained the Commission and directed the Telegraph Company to obey the order forthwith. (*Western Union* v. *Foster*, 224 Mass. 365.) (The statute creating this Commission is set out in the appendix to this brief.)

Immediately following this decision appellant filed the present bill, which alleges that the Telegraph

Company intended to comply with the order of the Commission as soon as it became operative, and this the answer of the Telegraph Company, subsequently filed, admits (Rec., p. 40).

This bill also alleges that in the contract between the Exchange and the Telegraph Company respecting the distribution of the quotations the latter is required to exact from every person desiring the quotations a written application, as above stated, and agrees to withhold quotations from persons whose applications shall not be approved by the Exchange. (For contract, see Rec., pp. 27-35.)

This bill also sets up the aforesaid proceedings before the Public Service Commission and state court, and explains the method of transmitting the quotations and claims that it constitutes, within the meaning of the Federal Constitution, interstate commerce, which Congress has the exclusive right to regulate, that Congress had, by the Amendment of June 18, 1910, vested in the Interstate Commerce Commission the exclusive jurisdiction of such complaints as Foster's, and that by reason thereof the Massachusetts statute conferring upon the Public Service Commission jurisdiction respecting the distribution of these quotations, as well as these orders of the Commission and of the Supreme Court, are for this reason void.

The bill also claims that these quotations are the property of the Stock Exchange, that it has the right to select persons, to whom they should go, and the right to avail itself of the services of any common carrier for the purpose of thus selling them, and that the state statute conferring power on the

Public Service Commission, as well as its order and the order of the Supreme Court—which are based on such statute—violated the Constitution of the United States, in that they will deprive the Stock Exchange of its said rights without due process of law.

The prayer of the bill is that this state statute—and the order of the Commission and of the Supreme Court based thereon—be adjudged violative of the Constitution of the United States, null and void, and as constituting no excuse or reason why said Telegraph Company should not, as respects said Foster, comply with its contract with the Exchange; and that the Telegraph Company be enjoined from delivering, and appellee Foster from receiving, said quotations until he shall have secured the approval of the Exchange.

The bill originally made parties only the Telegraph Company and Foster, both of whom filed answers (Rec., p. 39-40).

But the District Court sustained appellee Foster's claim that the Public Service Commission was a necessary party, and the bill was amended by making its members defendants; and they filed (with their answer) a motion to dismiss the bill on the ground that the court was without jurisdiction because the bill presented no federal question.

Upon the hearing of this motion the District Court, "upon consideration of the bill of complaint and motion to dismiss, but without the submission of evidence or further hearing of the parties," entered a final decree that "the court being of opinion that it is without jurisdiction of the cause as to any

of the said defendants and also that, even if this court has jurisdiction, the bill does not state a case entitling the complainant to the relief prayed for," "the bill of complaint be dismissed as to all the defendants for want of jurisdiction and also for want of equity appearing in the bill." (Rec., 54.) (See opinion of the District Judge, p. 55 of the record.)

Thereupon the District Judge, in allowing this appeal also filed the following certificate (Rec., p. 63):

"In pursuance of Section 238 of the Judicial Code this court certifies to the Supreme Court the following question of jurisdiction in the above entitled case:

'Whether the bill in this case presents a controversy which arises under the Constitution or laws of the United States within the meaning of Section 24 of the Judicial Code'."

After the present bill was filed the Telegraph Company sued out a writ of error from this court to review the decision of the Supreme Court of Massachusetts, which stands here as Case No. 274.

Thus the principal question here is, whether the District Court had jurisdiction.

There is no diversity of citizenship; but appellant claims that the bill presents the three following federal questions, each of which is sufficient to sustain jurisdiction;

(1) That the Commission was without jurisdiction of the subject-matter, or of the person of the Exchange, and hence its order will deprive the Exchange of its property without due process of law.

(2) That by the Act to Regulate Commerce, the

Interstate Commerce Commission has exclusive jurisdiction of Foster's complaint.

(3) That the Exchange as the owner of the quotations may withhold them from those, whose applications therefor it does not approve; and that by this order its property is taken for private use without its consent, contrary to the Federal Constitution.

The errors relied upon are that the District Court did not (1) retain jurisdiction, and (2) enter a decree for complainants upon the merits.

ARGUMENT.

I.

To sustain jurisdiction it is only necessary that the bill present a real and substantial question under the constitution or laws of the United States.

A case is within Sec. 24 of the Judicial Code, where it necessarily involves a question arising under the Constitution or a law of the United States, and it cannot be decided without deciding that question—that is, whenever the title or right set up by the party may be defeated by one construction of such Constitution or law, or sustained by the opposite construction. It is only necessary that the suit be one which does really and substantially involve such a question or right. It is not essential that the plaintiff should be right in his contention.

Gold-Washing Co. v. *Keyes*, 96 U. S., 199.
Starin v. *New York*, 115 U. S., 248.
Defiance Water Co. v. *Defiance*, 191 U. S., 184, 191.
The Fair v. *Kohler Die Co.*, 228 U. S., 22, 25.
Geneva Furniture Co. v. *Karpen*, 238 U. S., 254-258.

II.

The order of the Commission was a nullity because the Commission lacked jurisdiction of the person of the Exchange and of the subject matter.

The Commission, under a state statute, which, as

construed by the Massachusetts Supreme Court, confers power to do so, has made an order requiring the Telegraph Company to give these quotations to appellee Foster, in violation of its contract with the Exchange; and this order, having been confirmed by its Supreme Court, now has behind it the coercive power of the state of Massachusetts.

We say the order required the Telegraph Company to give Foster the quotations—although in terms it only requires it "to remove the discrimination"—because we cannot but regard as fantastic the suggestion of counsel that the order gives another possible alternative—the withdrawal of tickers from all its customers in Massachusetts. An order involves compulsion, although it may also permit the doing of something else, which so burdens the party that he cannot in reason do it. It would wrong innocent customers. It would cause a serious loss of revenue. It would be impossible of accomplishment, because such customers could successfully appeal to the courts to prevent the loss of their tickers, and thus involve the Telegraph Company in burdensome litigation.

Besides, a compliance with this other alternative would also unlawfully deprive the Exchange of its property, because a state may not impair one's right to make interstate sales, or a contract having this purpose.

Savage v. *Jones*, 225 U. S. 501, 520.
American Exp. Co. v. *Iowa*, 196 U. S. 143.

If one state may prohibit the sale of these quotations, all may, and thereby the Exchange would be entirely deprived of its revenue therefrom.

A bill to annul such an order, although making a public service commission a party—as the suit at bar does—is not a suit against the state itself.

Mississippi R. R. Com. v. *Illinois R. R.*, 203 U. S. 335, 340.

Greene v. *L. & I. R. R.*, 244 U. S. 499, 506.

This Commission was here exercising a power which, as respects the Exchange, was quasi-judicial, and is not distinguishable from the one adjudged void in

Missouri Pac. R. R. v. *Nebraska*, 164 U. S. 402,

where a state statute, as construed by the State Supreme Court, authorized a state commission to require a railroad company, which had permitted two persons to erect elevators on its right of way, to grant similar privileges to other persons in the neighborhood, and this was held to be a taking of property without due process of law in violation of the Federal constitution.

Again this order involves property which belongs to the Exchange and thus deprives the Exchange of its property. For under

Board of Trade v. *Christie*, 198 U. S., 236,

Hunt v. *New York Cotton Exchange*, 205 U. S., 322,

McDearmott v. *Board of Trade*, 146 Fed. 961, 77 C. C. A. 479.

Board of Trade v. *Hadden Krull Co.*, 109 Fed. 705.

it is no longer an open question that

(1) These quotations when collected—and although distributed in the limited way prescribed in the contract between the exchange and the telegraph

company—are a species of property and are the property of the exchange; and

(2) That the property right therein remains in the exchange even after the quotations have passed from it over wires and tickers to numerous prescribed persons, to whom the exchange has permitted them to be given for their private use.

This market news constitutes property of a peculiar kind. It is by means of many telegraph wires transmitted to numerous tickers and is susceptible of being indefinitely manifolded. However many persons it may be thus sold to, its volume or quality remaining with the exchange is thereby in no way diminished. Thus despite such distribution, the exchange retains the general property right in the quotations, with respect to which the exchange possesses all the rights which constitute property, including the right to keep it from those, to whom it is unwilling to give or sell it.

The Exchange retaining this general property, whoever appropriates this news without its sanction encroaches upon this property right—deprives it of its property.

The foregoing cases decide that one who, without the consent of the exchange, takes its quotations from wires, over which they are passing, or from blackboards or tickers, upon which they are exposed in the offices of approved applicants, is guilty of an invasion of this property right, which the courts at the suit of the exchange will enjoin.

This right of an exchange to sell its quotations to a limited number of persons for their personal use without losing its right to withhold them from oth-

ers being thus judicially established, the exchange has the right (common to all other owners) to use common carriers for the purpose of rendering its property valuable.

Hence the taking of these quotations, without the sanction of the Exchange, from a carrier in the act of transmitting them to certain persons in and beyond the state of Massachusetts, is, unless under the sanction of a valid judicial proceeding, just as much a wrongful taking from the Exchange, as is a taking of them from a blackboard in the office of a broker, to whom the Exchange gives them.

This order of the Commission therefore will, unless annulled, result in depriving the Exchange of its property by an act of the state—that is, by process of law—and the only remaining question here is, whether it is *due* process of law.

No proceeding of this nature is "due process of law," unless the tribunal entertaining it has jurisdiction both of the subject matter and the person. Appellant claims that this Commission, in making this order, had neither.

(1) *A want of jurisdiction of the person.* The Commission made no attempt to acquire jurisdiction of the Exchange. Indeed, the law creating the Commission (Acts of 1913, ch. 534, sec. 2) confers jurisdiction and control only over persons, firms or corporations, etc., *furnishing public service,* which is defined to be the transportation of persons and property, and the transmission of intelligence by electricity within the commonwealth. Sections 22 and 23 of the Act contemplate complaints *by* individ-

uals against carriers. But the act (which is printed in the appendix to this brief) nowhere provides that the Commission may make any person, other than a carrier, a respondent to a proceeding before it, or that any such person may *sua sponte* become such; and this doubtless accounts for the fact that the Exchange was not made a party to the proceeding.

It is claimed that the Exchange was a party to, and is bound by, the order of the Commission, because under its contract with the Telegraph Company, it had the right to intervene in, and assume the defense of, any suit brought against the Telegraph Company; but a direct authority to the contrary is

Hunt v. *Cotton Exchange*, 205 U. S. 322.

There Hunt sought to retain the quotations of the Cotton Exchange, and secured from a state court in a suit, to which the Telegraph Company was the only party, a temporary injunction restraining the removal of his ticker. The Cotton Exchange, ignoring this state court case, filed in a Federal court a bill—substantially like the one at bar—against Hunt and the Telegraph Company, to enjoin the receipt by the former, and the delivery by the latter, of quotations. Hunt set up as a defense the pendency of the suit in the state court. The Telegraph Company's contract with the exchange in that case provided (see p. 8 of record in that case) that "in cases brought against the Telegraph Company, the Exchange may defend by its own counsel at its own expense in the name of the Telegraph Company," and in his brief (p. 26) Hunt's counsel claimed that "it was open to appellee to direct the conduct of the

suit in the state courts, * * * for in that suit the Western Union Telegraph Company was to all intents and purposes the representative of the New York Cotton Exchange." This court held that under its earlier decision in *Watson* v. *Jones*, 13 Wall. 679, the question was, whether a final decree in the state court would be *res adjudicata* against the Exchange, and that it would not be because, among other reasons, the exchange was not a party to the state suit. (See further on this point, pp. 59, 60, of this brief.)

That a judicial or quasi judicial proceeding, to constitute "due process of law," must rest upon notice and an opportunity to defend, and that where it contemplates an order or judgment, like the present order, not operating *in rem*, there must be personal service within the state in which the proceeding is brought, upon all persons to be deprived of property, are no longer open questions.

Pennoyer v. *Neff*, 95 U. S. 714, 733.
Scott v. *McNeal*, 154 U. S. 34.
Simon v. *Southern Rwy.*, 236 U. S. 115, 122.

(In the last case this court also held that a suit to enjoin such a judgment was not one to enjoin a suit in a state court within Sec. 720 of the R. S.)

(2) *There was no jurisdiction of the subject matter* (the quotations), because their distribution in Massachusetts was interstate commerce.

The bill—whose allegations are to be accepted because its dismissal by the District Court was tantamount to a dismissal upon demurrer—describes the collection and distribution of these quotations as follows (Rec., 7):

"That said continuous quotations of said Stock Exchange, after being collected by said Stock Exchange and after being received by said Western Union Telegraph Company in the city of New York as aforesaid, are by said telegraph company transmitted to the city of Boston, Massachusetts, over one of its telegraph wires running to its office in the city of Boston, such wire during said market hours of said Stock Exchange being used exclusively for the transmission of said stock quotations; that at the city of Boston end of said telegraph wire an operator in the employ of said Western Union Telegraph Company receives said quotations and immediately writes the same on slips of paper, which are immediately handed to another employee of said Western Union Telegraph Company in its said office in Boston, who operates an instrument known as a ticker transmitter, from which wires run to the instruments known as tickers in the offices of brokers and others in the city of Boston, who desire to receive said quotations, and whose applications therefor have been approved by said Stock Exchange as aforesaid, said tickers being so constructed as to print consecutively upon automatically unrolling rolls of paper tape in letters and figures the names of the stock and the price therefor in each such transaction upon the said New York Stock Exchange; that said transmission of said quotations from New York over said wire and the retransmitting thereof as aforesaid at the city of Boston through said ticker transmitter and the printing thereof on all of said tickers in the city of Boston, begins immediately after the opening of the market of said New York Stock Exchange at ten

o'clock A. M., and is thence continued uninterruptedly until the closing of said market on that day, and that in said method of transmission from New York and distribution in the city of Boston, the identical market news or quotations, which are so sent out from New York upon said wire, pass over said ticker wires and are printed upon each of said tickers."

Appellees, while conceding that the transmission was in part interstate commerce, claim that its interstate character ceased when the quotations were taken off the New York-Boston wire in the office of the Telegraph Company at Boston; while appellant claims that it continued until the quotations reached the brokers' offices in Boston; and this is the nub of this question.

All now concede that a sale or transportation or service does not lose its interstate character merely because it crosses the state line. The question in all cases is when or where, within the state where the property is to be delivered or the transportation or service ends, the interstate character does cease.

This question arising under varying conditions and as respects different subject-matters, has resulted in many decisions, which are apt to confuse the mind and render the decision of a particular case difficult, unless, at the outset, the different phases of the question are distinguished.

Adopting this process of elimination—the numerous decisions involving the question, when a state may impose general non-discriminating taxes upon property shipped into the state from another state (such as *Brown* v. *Houston*, 114 U. S. 622; *Amer-*

ican Steel & Wire Co. v. *Speed*, 192 U. S. 500; *Pittsburgh Coal Co.* v. *Bates*, 156 U. S. 577) have no application to the question here; for these cases concede that the goods, which were held taxable, had not completely lost their character as interstate commerce. As expressed by this court in the *American Steel & Wire case, supra.*

"As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to regulation in the sense of the constitution, although its levy might remotely and indirectly affect interstate commerce."

In such cases it is unimportant whether the property has been unloaded from the car or boat, in which it was transported to the state, or whether it remains in an original package. The only question is, whether it has reached its destination.

But this principle must be, and has by this court been, confined to goods shipped from one state to another. It cannot apply to goods imported from a foreign country, because no state may, without the consent of Congress, tax *imports* or their sale (*Brown* v. *Maryland*, 12 Wheat. 419); but this does not include interstate transactions (*Am. Steel Co.* v. *Speed*, 192 U. S. 50).

Again, the foregoing cases upholding a state's right to tax *property* are not to be confounded with another group of decisions (such as *Robbins* v. *Shelby District*, 120 U. S. 489; *Brennan* v. *Titusville*, 153 U. S. 289; *Asher* v. *Texas*, 128 U. S. 129; *Cald-*

well v. *North Carolina,* 187 U. S. 622), which have held that a state statute or ordinance exacting a license or tax from *persons* engaged in selling, as agents or otherwise, property shipped or to be shipped from another state, imposes an illegal burden upon interstate commerce, even though such enactment imposes a like tax upon persons selling like property not shipped from another state.

Again, the point where property loses its interstate character often depends upon the purpose of the person responsible for the shipment.

Where a seller of property shipping it from another state uses a carrier merely for the purpose of making delivery to his purchaser, or where the property is brought by one into a state for his personal use only, the interstate character of the transaction terminates *when the transportation ends,* but not, however, until the purchaser or consignee has taken over the property or had a reasonable time in which to do so.

Bowman v. *Chicago Ry.* Co., 125 U. S. 465.

Rhodes v. *Iowa,* 170 U. S. 412.

Heyman v. *Southern Ry.,* 203 U. S. 270.

The principle of these cases resolves the present question in favor of appellant, if the Exchange is the distributor of these quotations.

It thus becomes important to ascertain whether, under the contract between the Exchange and the Telegraph Company, the Exchange is such distributor through the agency of the Telegraph Company, or—as claimed by appellees—the Telegraph Com-

pany is the purchaser of the quotations and resells them.

The features of the contract essential here are, that nowhere in the contract are the usual terms of purchase or sale used; nor does the Telegraph Company acquire the right to resell to whom it pleases, or such other control of the property as usually passes to a purchaser. The Exchange agrees at its own expense to "*furnish*" to the Telegraph Company under the limitations and restrictions hereinafter prescribed, full and continuous quotations of prices made upon the Exchange. * * * Neither said quotations, nor any part thereof * * * shall be *furnished* by the Telegraph Company or its employes to any person or in any manner except as herein provided. * * * The Telegraph Company shall not, after the first day of November, 1914, *furnish* quotations by ticker or otherwise, in the volume of continuous quotations, to any subscriber therefor, unless the subscriber shall have signed in duplicate an application [the form of which is set out in the contract], and the subscriber shall have been approved by the Exchange. * * * The Telegraph Company further agrees that in case any person shall fail to comply with any conditions * * * in the application * * * it will, at its own risk, cost, and expense, terminate the contract between him and it, and the *furnishing* of said quotations to him thereunder. * * * The Telegraph Company shall, unless enjoined by any court from doing so, discontinue *furnishing* said quotations to any person * * * whenever notified by the Exchange of its disapproval of such person [upon being indemnified by the Ex-

change]. The Telegraph Company agrees to pay the Exchange at the rate of $50,000 per annum during the continuance of this agreement." * * * "The Exchange reserves the right to contract with any other telegraph company to furnish such quotations to it."

In other words, the quotations are the property of the Exchange, which at its expense collects and furnishes them to the Telegraph Company. The Exchange determines to whom they shall be forwarded; it may also withdraw them from any person receiving them, the Telegraph Company agreeing to do this whenever requested by the Exchange. These and other provisions of the contract emphasize the purpose of the parties to be that the Exchange should retain control over the quotations.

The clear purpose of this contract was to provide a method by which this property of the Exchange might be furnished by it to certain designated persons approved by it, through the agency of the Telegraph Company, so long as in its opinion such persons do not misuse the quotations.

In legal effect it is a contract by which the Telegraph Company, as carrier, agrees to transmit this news for the Exchange to certain persons to be designated by it, and to accept as compensation for such service all that can be realized from the quotations in excess of a certain sum, the Telegraph Company thus in effect guaranteeing that the sale of these quotations shall net the Exchange that sum.

If the contract had been worded in terms as here stated, it would not in legal effect have differed at all from the contract as actually drawn. When

it is thus so easy to change the language of the contract without changing its legal effect, would it not be futile to decide this case on the mere form or language of the contract, instead of its underlying intent and purpose?

The construction here contended for was given to a similar contract in

Stock Exchange v. *Board of Trade,* 127 Ill. 153.

There, as here, the exchange collected the quotations through its agents, and turned them over to a telegraph company to distribute to such persons only as the exchange should approve. There, as here, the telegraph company paid the exchange a fixed sum; and the court construed the contract as constituting the exchange, rather than the telegraph company, the distributor of the quotations, as is apparent from the following language used by it (*italics being ours*):

> "We do not wish to be understood as holding that the *Board of Trade* is bound, by law, to *continue* the business of collecting, and furnishing to the public, market quotations, or that it may not voluntarily abandon such business; but we hold, that *so long as it continues to carry it on,* either directly or indirectly, *it* must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms."

The same contract was construed the same way by Judge Blodgett in

Marine Exchange v. *Telegraph Co.,* 22 Fed. 23.

A similar contract between the Stock Exchange and the Telegraph Company (which appears in full at Rec., p. 10) was construed in the same way by the Appellate Div., 1st Dept., in

In re Renville, 61 N. Y. Supp. 549, 46 App. Div. (N. Y.) 37.

(See quotation from opinion at p. 46 of this brief.)

Thus, as under this contract the Telegraph Company merely acts as a carrier in transporting for the Exchange the quotations from New York City to the offices of approved brokers in Boston, their interstate character ceases only when the transportation is at an end—that is, when the quotations have reached the brokers' offices.

But the question becomes a somewhat different one, when the property is brought by the owner into a state for the purpose of sale by him there; and, for the sake of argument only, let us assume that under this contract the Telegraph Company is the seller. In this view the question is, when does property brought, or sent by one from one state into another *for the purpose of selling* it in the latter lose its interstate character?

This question first arose in this court somewhat incidentally (that is, where the question concerned an import from a foreign country), in

Brown v. *Maryland,* 12 Wheat. 419,

and this court there held that the interstate character of the transaction continued until after a sale, unless the owner by some act of his sooner terminated it. The precise question was, whether a state statute requiring a state license as a pre-requisite to a sale of

imports violated the Federal Constitution, and Chief Justice MARSHALL, speaking for this court, said:

> "If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has the right, not only to authorize importation, but to authorize the importer to sell. * * * Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of the regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation."

It is true that that case involved a consideration of that clause of the constitution prohibiting a state tax upon imports as well as the interstate commerce clause of the Constitution, but the Chief Justice used the foregoing language when construing the latter, and added:

> "It may be proper to add, that we suppose the

principles laid down in this case, to apply equally to importations from a sister state."

Subsequently the contrary view was taken by this court in one of the license cases,

Peirce v. *New Hampshire,* 5 How. 554, 557,

where this court upheld a New Hampshire statute penalizing any one who sold liquor within the state without a license when applied to a barrel of gin purchased in Boston and shipped to New Hampshire, and in doing so held that the property lost its interstate character before a sale in New Hampshire, at least in the absence of contrary legislation by Congress.

But by later decisions the principle has become firmly established that, where property is brought by a person into a state from another for the purpose of sale, its interstate character remains until after such sale, and that even in the absence of congressional action a state statute, which attempts to regulate or control such sale, is a burden on interstate commerce.

Leisy v. *Hardin,* 135 U. S. 100, 124.

Schollenberger v. *Pennsylvania,* 171 U. S. 1, 21.

Leisy v. *Hardin, supra,* sustained the right to sell such property on the ground that by such "act alone it would become mingled in the common mass of property within the state," and expressly overruled *Pierce* v. *New Hampshire, supra.*

This right is not merely a right to sell at wholesale. It includes, as we shall presently see, the right also to sell at retail.

Again, as a delivery is essential to every sale, this right includes the transportation of the property to the place where under the terms of the sale it is to be delivered to the purchaser. (*Kirkmeyer* v. *Kansas*, 236 U. S. 568, 572, and cases cited.)

One may go from place to place selling such property. (*Welton* v. *State*, 91 U. S. 275.)

This transportation need not be one single and continuous act, or be confined to one single vehicle or method of transportation. It may consist of different parts of a continuing interstate movement contemplated at the time of shipment. (*Western Oil Co.* v. *Lipscomb*, 244 U. S. 346, and cases cited.) One may bring numerous separated articles across the state line in a single vehicle for sale to a number of different individuals, and complete delivery by use of other wagons without depriving the sales of their interstate character. (See *Kirkmeyer* v. *Kansas*, 236 U. S. 569.)

So, where the subject matter of the interstate commerce is news transmissible by telegraphy, the news need not be carried from without the state to the purchaser *upon a single wire*, or even wholly by wire. A telegraph message does not lose its interstate character, because, after reaching the office of the telegraph company within the state, it takes the form of a written message and is delivered by messenger.

So these quotations do not lose their interstate character because, in order to make them almost instantly available to the brokers (which is their chief element of value), they are—instead of being sent by messengers—transferred by operators from the long

distance New York wire to an instrument known as a ticker transmitter, which sends them upon individual wires to the tickers in the brokers' offices.

This is essential that brokers in Boston may be brought as near to a personal contact with the market as are brokers in New York, who are not upon the exchange floor, and that brokers in Boston may know what the market prices *are*, rather than what they *have been*. This right to sell certainly must include the privilege of selling in the most feasible and profitable way.

The interstate character of this service would not be lost, if it were electrically feasible to transmit it over the Boston-New York wire directly to the numerous ticker wires without the intervention of any human agency, or if it were practicable to have these individual ticker wires run from a ticker transmitter operated in New York directly to the tickers in Boston. Indeed, for short distances, between New York and Jersey City or St. Louis and East St. Louis, this can now be done, and inventive genius may in time further overcome distance in this method of transmission. The application of constitutional guaranties should not turn upon methods of electrical transmission so subject to change.

The case at bar is easily distinguishable from *Penn. R. R. Co.* v. *Knight*, 192 U. S. 21 (and like cases), as in that case the cab service had "no contractual or necessary relation to transportation. It was individually contracted for and not necessarily connected" with transportation; whereas in the case at bar the contract between the Exchange and the Telegraph Company, as well as the contract of each

Boston broker, contemplates the delivery of the quotations upon a ticker in such broker's office.

Nor is it of any legal significance that in transmitting this market news by telegraph from New York to Boston abbreviations and symbols are used, which in transferring the news to the ticker wires are enlarged so as to be more intelligible to those not versed in telegraphy. Even then the quotations still appear on the tickers in abbreviated symbols. This reduction to plain English is more marked in ordinary telegraph messages, which are not thereby deprived of their interstate character.

Nor is the interstate character lost, because property brought into a state for the purpose of sale is to a certain extent manipulated before delivery to the purchasers.

Caldwell v. *North Carolina*, 187 U. S. 952.
Am. Express Co. v. *Iowa*, 196 U. S. 443.

In the former case an agent of a corporation of one state went into another for the purpose of delivering certain pictures and frames previously sold there by other employes of the company. The pictures and frames came into the state packed in larger packages for convenience in shipment, and each picture was within the state placed in its proper frame and then delivered to the purchaser. But it was held that thereby the property had not ceased to be in interstate commerce.

Assuming that the Telegraph Company is the purchaser, this case is well within the foregoing principle. Each day it acquires the quotations in New York for the purpose only of selling them to certain

designated persons in Boston and elsewhere, and to give these purchasers the highest possible value in the quotations, each quotation, as it is made and received by the Telegraph Company, is transmitted by the most approved, expeditious and economical method to tickers in the brokers' offices, all these instrumentalities belonging to the Telegraph Company. This transmission to Boston is solely for the purpose of sale there, and the news is not delivered—that is, the sales are not completed—until it appears upon these tickers. It is thus sold and delivered in the only way, in which it is feasible to sell it.

In transmission this news is neither increased, decreased, changed in its character, or subdivided into parts. The identical market news, which in New York is put upon and goes over the New York-Boston wire, passes over each of the ticker wires and is received by each ticker customer in Boston.

It being thus settled that, when this news is brought from New York to Massachusetts solely for the purpose of selling it there, its interstate character adheres to it until it is sold—whether sold to one or many persons—and that such right of sale includes the right to deliver to the purchasers, and this property being delivered to such purchasers in the only practicable way, it would seem clear that its interstate character must adhere to such news until after it appears upon the Boston tickers.

It is true that, to benefit by this principle, one must avail himself of this right of sale, and that by acts he may indicate his desire not to do so. It is true that this court has, as respects such tangible

property as is susceptible of being packed and transported in individual packages or receptacles, fixed a practical termination to this right.

The first expression of this limitation is apparently found in *Brown* v. *Maryland*, 12 Wheat., already cited, where this court said (italics ours):

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and *mixed up with the mass of property in the country*, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution. * * *
>
> This state of things is changed, if he sells them, or *otherwise mixes them with the general property of the state*, by breaking up his packages, and traveling with them as an itinerant peddler."

This language, used in a case involving only the right of a state to tax the sale of imports, has in subsequent cases been extended to interstate shipments, and is now commonly known as the "Original Package Doctrine;" and appellees rely upon this doctrine.

None of the decisions seem to suggest the basic reason for this doctrine. Applied solely to cases involving the taxing power of the state one reason at least probably was that the state taxing officers would often be unable to determine whether the property was subject to the state tax after the original condition or identity of the property had been destroyed.

But this doctrine is not susceptible of intelligent application to property such as grain, coal or oil shipped in bulk in carload lots, nor to intangible property like news. There are in such shipments no such things as original packages. These quotations before delivery upon these tickers are not subdivided into parts for the purpose of sale, nor do they lose their identity. If, therefore, this original package doctrine is here helpful at all, it can only be by way of analogy.

Here at the outset we should discard as irrelevant certain cases, which reject the doctrine upon the ground that the method of shipments resorted to was tantamount to a fraud, or an improper attempt to misapply the doctrine. Such are:

Austin v. *Tennessee*, 179 U. S. 343, 55.
Cook v. *Marshall*, 196 U. S. 261.

The original package doctrine protects sales at retail as well as at wholesale and the size of the package, if bona fide, is immaterial.

Schollenberger v. *Pennsylvania*, 171 U. S. 1.
Rearick v. *Pennsylvania*, 203 U. S. 507.

In the Schollenberger case oleomargarine was manufactured in another state, and consigned in ten pound packages (that being the quantity in which consumers bought), to an agent of the manufacturer in Pennsylvania and sales thereof by him were held interstate sales. This court saying:

> "We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer."

In the Rearick case an Ohio corporation employed an agent to solicit in Pennsylvania numerous retail orders for groceries, which it filled in Ohio by putting up the articles of the several orders in distinct packages and forwarding them to its agent in Pennsylvania, so marked that he could deliver them to the customers, which he did and received payment therefor. Brooms tagged and marked like the other articles were tied together in groups of about a dozen, wrapped up conveniently for shipment. The court held that these goods were original packages when delivered to the customers, saying:

> "The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical sense."

As in the last two cases, the quotations here start in their transmission into the state specifically appropriated for delivery to certain specified persons. The quotations intended for different persons are no more grouped together for the purposes of transmission than were the brooms in the Rearick case.

Nor is the case of *Mutual Film Co.* v. *Ohio Commission*, 236 U. S. 230 (relied on by appellees), in conflict with the foregoing cases. It involved a state statute which was distinctly an exercise of the police power. It provided for censorship of moving picture films manufactured without the state and sold or leased to exchanges within the state, which in turn rented them to exhibitors within the state. The case involved no question of the right of an importer to *sell*, but only the right of such exchanges to use or license others to use. It did not require film owners to sell to exchanges which they did not approve. It did not prevent the display of films fit for exhibi-

tion. That Ohio statute thus was well within the principle announced in *Savage* v. *Jones*, 225 U. S. 501, 525 and cases cited, that a state police regulation, in the absence of affirmative act of Congress, is only to be condemned, when it clearly does directly or substantially burden interstate commerce instead of merely indirectly or incidentally doing so.

This Massachusetts statute, on the contrary, is in no proper sense a police regulation. Its only aim is to secure from public service corporations efficient service at reasonable rates and without discrimination.

Thus whether the Exchange or the Telegraph Company be regarded as the owner and distributor of this news, it does not lose its interstate character before it is automatically printed upon the tickers in the brokers' offices in Boston.

The next question is, whether—this distribution being interstate in character—a state commission has any jurisdiction of a complaint like Foster's.

We do not here overlook the principle that, as respects some things, a statute affecting interstate commerce may be operative until Congress shall have acted. But the limits of this field of legislation, are thus stated by Mr. Justice BRADLEY, in speaking of this power of Congress, in

Brown v. *Houston*, 114 U. S., 622-630:

"If not in all respects an exclusive power; if, in the absence of congressional action the state may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, * * * the power of Congress is exclusive

wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states, coming or brought within its jurisdiction. * * * So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammelled."

See also:

W. U. Tel. Co. v. *James*, 162 U. S. 650.
Bowman v. *Chicago Ry. Co.*, 125 U. S. 498.
Leisy v. *Hardin*, 135 U. S. 100, 109.

This principle was applied to interstate telegraphing where an Indiana statute, which undertook to prescribe the manner of delivery of messages sent from Indiana to other states, was declared void in *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, upon the ground that

"Conflict and confusion would only follow the attempted exercise of such a power."

This principle of uniformity must contemplate that there shall be no material discrimination in the extent or character of interstate telegraph service between citizens of different states. The rates and what such service shall consist in—that is, what communications by telegraph may go from one state to another, and what persons may receive them, must

be the same in all states. Otherwise, the regulation of interstate commerce by non-action of Congress results in a substantial discrimination between citizens of different states. Persons within the state enacting a restrictive statute will have one service, while persons in states without or with a different restrictive statute will have a different service, or if the statute is prohibitive, no service at all.

This requirement of one uniform regulation is specially necessary in the distribution of these market quotations; for they are susceptible of such easy and secret transmission across state lines and extensive re-distribution over leased wires that the unrestricted distribution in one state would make impossible restricted distribution elsewhere.

If Massachusetts may, until Congress acts, pass this particular statute, it (or any other state) may enact one compelling the distribution of these market quotations to all regardless of the use, to which they may be put, and thus the entire efforts of these exchanges to confine their quotations throughout the country to those, who will make only a lawful use of them, would be futile in the absence of affirmative action by Congress. Such a situation might compel the exchanges to cease altogether to distribute their quotations—as, not being public service corporations, they may at any time—and thus brokers in other states than Massachusetts would be deprived of these quotations by the act of a state other than their own.

Again, if a state may regulate, it may prohibit. What one state may do, others may do. Thus enough states may prohibit to make it unprofitable or unde-

sirable for the Exchanges to distribute at all, and thus brokers in non-restricting, or non-prohibiting states would be deprived of the quotations through the regulation of this commerce by other states.

Non-action by Congress was sufficient to prohibit state interference with inter-state liquor traffic. Why not equally so as to these quotations?

However, the effect of non-action by Congress is not an essential question here, because Congress has specifically legislated upon this subject and by the amendment of June 18, 1910, to the Act to Regulate Commerce, made telegraph companies engaged in interstate telegraphing common carriers within the original act.

Section 3 of that Act provides

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person * * * in any respect whatsoever, or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sec. 13 thereof authorizes any person claiming that any such common carrier is violating the act to apply to the Commission by petition for redress, and Sec. 15 provides that

"Whenever upon a full hearing upon the complaint made and provided in Sec. 13 of this Act, * * * the Commission shall be of the opinion that * * * any * * * practice whatsoever * * * of said carrier or carriers, subject to the provisions of this act are unjust or unreasonable, or

unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to decide and prescribe * * * what * * * practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease or desist from such violation to the extent that the commission finds the same to exist."

This comprehensive language clearly confers upon the Interstate Commerce Commission ample power to compel the Telegraph Company to grant to Foster, if entitled to it, the same relief he sought and obtained from the Public Service Commission.

As this Massachusetts statute (see appendix to this brief) uses substantially the same language in conferring power upon the Public Service Commission, appellees are in no position to claim that this statute does, while this Act of Congress does not, confer upon the body, which each creates, power to hear and determine complaints like Foster's.

The foregoing comprehensive language of the Interstate Commerce Act is not to be restricted—as appellees' counsel seek to do—by the language of Section 1 of this Commerce Act, providing that

"All charges made for any service rendered or to be rendered * * * for the transmission of *messages* by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust or unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful, *provided*, that messages by telegraph, telephone, or cable, subject to the provis-

ions of this act, may be classed into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Counsel contends that the word "messages" limits the comprehensive language of Sections 3 and 15 of the Act to the ordinary message service of the telegraph companies. But the word "message" doubtless is used in its comprehensive sense, to include any communication of information over telegraph wires. Furthermore, the foregoing provision of Section 1 relates only to *charges* to be made for the service, while Sections 3 and 15 cover also any *practice* whatsoever resulting in unjust discrimination.

Not only has Congress thus conferred on the Interstate Commerce Commission jurisdiction of complaints like appellee Foster's, but that Commission has so construed the amendment to the act, and stands ready to exercise such jurisdiction, as is apparent from its Conference Rulings (No. 305, March 13, 1911) as follows:

"Such telegraph and telephone companies, subject to the act, are also governed by the provisions of Section 3, forbidding any undue or unreasonable preference or advantage, by rebates, or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission, made pursuant to the provisions of Section 15 of the Act, and also Section 20 thereof, respecting the keeping of accounts and memoranda, and the making of reports to the Commission."

That state control of interstate telegraphic intercourse is now suspended is well illustrated in

Western Union Tel Co. v. *Bilisoly*, 116 Va. 562,

where a state statute had fixed a penalty for delays in delivering messages which the state court at first upheld (*Telegraph Co.* v. *White*, 113 Va. 421), but after the amendment of June 18, 1910, to the Act to Regulate Commerce the court held the state statute was superseded, although the federal statute did not impose a like penalty.

Hence the next question is, whether this Public Service Commission—which is not a court of general jurisdiction, but has only such administrative and judicial powers as the state statute confers—also has jurisdiction.

This brings us to the second federal question relied on to confer jurisdiction upon the District Court —the construction of the Act to Regulate Commerce.

In the very nature of the statutes creating them the jurisdictions of these two commissions cannot be concurrent. Each confers on its commission practically the same powers, except that one is confined to intrastate, and the other to interstate, commerce.

Thus, Section 23 of the state statute provides that whenever the Commission, upon complaint made to it, shall find that any *practice* of a common carrier subject to its jurisdiction is unjust or unreasonable, it shall determine the just and reasonable practice to be thereafter observed, and shall order the carrier to comply therewith. This order of the Commission is of this character and is based on this section.

Thus the terms of the two statutes are almost

identical in conferring on a commission power to prescribe what the future practice shall be, and to require compliance therewith. In the very nature of things such a power is exclusive of any like power applicable to the same subject-matter in any other commission; otherwise, one practice might be prescribed by a state commission and a different practice by the Interstate Commerce Commission.

The complaint of Foster arises out of a *practice* established by the Telegraph Company through, and as a result of, its contract with the Exchange, under which it gives the quotations only to persons, whose applications the Exchange approves. The Telegraph Company's refusal was in no sense a discrimination against Foster personally. It was merely a compliance with that practice, and would have been applied to any other person, and to all persons, whom the Exchange did not approve. It was not a departure from an established practice to the prejudice of an individual, but an adherence to a practice established for all.

The question, whether a carrier, as to its interstate business, may establish and conform to such a practice, or should be required to adopt a different one, is exclusively within the administrative functions of the Interstate Commerce Commission.

Penn. R. R. v. *Puritan Coal Co.*, 237 U. S. 121, 131.

Ill. Cent. R. R. v. *Mulberry Coal Co.*, 238 U. S. 275.

B. & O. R. R. v. *Pitcairn Coal Co.*, 215 U. S. 481.

Texas Ry. v. *Abilene Co.*, 204 U. S. 427.

Mitchell Co. v. *Penn. R. R.*, 230 U. S. 247.

Loomis v. *Lehigh R. R.*, 240 U. S. 43.
Morrisdale Coal Co. v. *Penna. R. R.*, 230 U. S. 304.
Robinson v. *B. & O. R. R.*, 222 U. S. 506.

In the *Puritan Coal* case, this court said:

"But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9.

But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

As applied to the present case the wisdom of such a rule is apparent. This state commission has decided that this present practice of the Telegraph

Company is vicious, and directed the carrier in the future to adopt a different practice. The Interstate Commerce Commission may consider and approve the present practice, and this would result in an intolerable conflict in Massachusetts in the duty prescribed to this carrier.

If the Telegraph Company had refused Foster the quotations after the approval of his application by the Exchange, for some reason applicable to Foster alone, Foster might appeal to a state court, and perhaps to this state commission, to secure the quotations; for in such a case the controversy would not have involved this practice.

We are here concerned only with the question, whether the Interstate Commerce Commission's *jurisdiction* of complaints such as Foster's, is exclusive of that of this state commission. We need not, therefore, here consider what *law* the Interstate Commerce Commission, in the exercise of its jurisdiction, should apply in deciding what practice is reasonable and proper for distributing these quotations.

Until this Commission shall have directed a discontinuance of the present method of distribution no court or tribunal, either state or the federal, may grant or deny relief upon the ground that this practice is an unjust discrimination or otherwise illegal.

Hence these Massachusetts tribunals were attempting to exercise a power, which under the Federal Constitution and the Commerce Act was denied to them, and their orders will, if not annulled, deprive the Exchange of its property without due process of law.

III.

IF OTHERWISE VALID, THE ORDER OF THE COMMISSION, BY COMPELLING THE DELIVERY OF THESE QUOTATIONS TO ONE NOT APPROVED BY THE EXCHANGE, WILL DEPRIVE THE EXCHANGE OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

In other words, even if the Exchange had been a party before the Public Service Commission and it had jurisdiction of the subject-matter—still, by taking these quotations from the carrier and delivering them to appellee without the Exchange's consent, the state is about to deprive the Exchange of its property without due process of law.

As the Exchange was not a party to the proceeding before the Commission, this question is properly presented by the bill in the case at bar.

The solution of this question does not at all depend upon the construction to be given to the Exchange's contract with the Telegraph Company; for if that contract be construed as a sale to the Telegraph Company, it is a sale only of a qualified interest in the quotations—the right to re-sell them to certain designated persons. The residue of this property right still remains in the Exchange (see p. 12 of this brief) and an order compelling delivery to any other person than those designated is an impairment of this right of the Exchange.

The question therefore is, what limitations the *courts* may impose upon this remaining interest of the Exchange.

As the Exchange is a voluntary unincorporated as-

sociation of individuals engaged in rendering no public service, and under no legal obligation to collect or distribute its quotations, its property right therein, except so far as transferred to the telegraph companies, includes the right to sell or not to sell, and to select those to whom it will sell, and this is legally subject to impairment or destruction only by due process of law. It is impaired whenever the Exchange is forced to sell to persons it does not care to, as well as when forced to sell at a price it is unwilling to accept. The Exchange also enjoys the right—common to all owners—to use common carriers to convey its property to purchasers.

This property right must, therefore, be deemed absolute, and to include the right of the Exchange to discriminate between persons in the distribution of the quotations, unless it has been lost either:

(1) Because these quotations have become legally impressed with a "public use" to the extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops; or

(2) Because the Exchange, by resorting to the telegraph companies—as, because of the nature of the property, it must do in order to sell at all—involuntarily impairs its property right to the extent of being obliged to sell it to those, to whom it does not think it safe to entrust its quotations. In other words, the Exchange must suffer this impairment of its property in order to secure the services of common carriers to realize its value.

(1) We have here no right to an unrestricted distribution acquired by dedication or adverse use.

Weems Steamboat Co. v. *Peoples Co.*, 214 U. S. 345.

Not only has the Exchange for at least twenty-five years (see its contracts with the Telegraph Co., Rec., 10-35) asserted and reserved its right to disapprove applicants, but it is difficult to see how a neglect respecting past quotations can create a right, or impose a duty, respecting future quotations.

Upon this first question the Illinois Supreme Court has held in

New York, etc., Exchange v. *Board of Trade,* 127 Ill. 153,

that, while the Chicago Board of Trade was under no legal obligation to furnish its quotations to the public, they had, because distributed unrestrictedly for a number of years, become so affected with a public use and so subject to regulations by the courts, that if distributed at all, they must be sold without discrimination to all who may desire them for lawful purposes, basing its decision upon *Munn* v. *People,* 94 U. S. 113. It was not, however, even suggested in that decision that the Exchange's right in its quotations was in any way impaired because public telegraph companies assisted in their distribution.

But the Illinois court here failed to notice that *Munn* v. *People* involved only the validity of a *statute* fixing rates of storage in public elevators, which this court upheld because a proper exercise of the police power.

On the contrary the following cases uphold the right of an exchange—at least in the absence of affirmative legislation—to say to whom its quotations shall go, especially where, as in the case at bar, they are collected by the exchange itself.

Board of Trade v. *Christie,* 116 Fed. 944.

Matter of Renville, 61 N. Y. Supp. 549, 46 App. Div. (N. Y.) 37.

Metropolitan Grain & Stock Exchange v. *Board of Trade*, 15 Fed. 847.

Bryant v. *Western Union Telegraph Co.*, 17 Fed. 825.

Marine Exchange v. *Western Union Tel. Co.*, 22 Fed. 23.

Wilson v. *Commercial Tel. Co.*, 3 N. Y. Supp. 633.

In *Board of Trade* v. *Christie, supra*, Judge Hook said:

> "I am of the opinion that courts cannot by their decrees assume the initiative in declaring private property to be impressed with a public use. * * * The power to bring under government control the lawful business of individuals and private corporations not vested with the power of eminent domain and who are not engaged in what, by common acceptation, is termed a public service, for the reason that such business, through the enterprise and prudent management of its conductors, has grown to be of great public interest and concern, is of the gravest and most momentous character. * * * When such a condition arises, the measure of the public control is limited by the extent of the public interest and the making of regulations pertaining thereto is of the legislative, not judicial cognizance."

In Matter of Renville, *supra*, the Appellate Division, First Dept., said:

> "No statute requires a telegraph company to communicate to the public despatches which it has received from other individuals, to be transmitted to specified persons. * * * Under this agreement between the stock exchange and the respondents [set out in the present record at p. 10], certain information is given to

the telegraph company to be communicated to individuals or corporations designated by the stock exchange. * * * The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates, and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents [telegraph companies] should be required to violate their agreement with the stock exchange and the law of this state, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose, and none other. * * *

But the question may well be asked, where does the court get this power? No statute gives it; * * * and to grant such an application would, it seems to me, be an interference with the liberty of the individual which is protected by the constitution and the law."

That private property may be impressed with a public use only by legislative act is also decided in:

Express Cases, 117 U. S. 29.

A. T. & S. F. R. Co. v. *D. & N. O. R. Co.*, 110 U. S. 667, 682.

State v. *Assd. Press*, 159 Mo. 410.

Ladd v. *F. C. P. & M. Co.*, 53 Tex. 172.

Del. L. & W. R. R. v. *Stock Yards Co.*, 45 N. J. Eq. 50.

Heim v. *N. Y. Stock Exchange*, 118 N. Y. Supp. 591.

In Express Cases, *supra*, where one express company claimed from a railroad company the same privileges it conferred on another express company, the court said:

> "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

The Illinois Court, while apparently overlooking this principle in 127 Ill., *supra*, subsequently recognized it in

Live Stock Company v. *Live Stock Exchange*, 143 Ill. 210,

where it rejected the contention that the Chicago Live Stock Exchange had, by reason of its magnitude and far-reaching influence upon the country, become impressed with a public use, saying (p. 238):

> "Ordinarily, the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the legislature and not for the courts. Accordingly, it may be held to be a general, though perhaps not an invariable rule, that the question whether a particular business which has hitherto been deemed to be private, is public and impressed with a public use, is for the legislature. * * *
>
> Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their pur-

view is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici*, would be surrounded with very great difficulties and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test."

This is peculiarly a function of the legislative branch, because it draws its membership from all sections and is presumably more familiar, than courts can be, with what are the people's needs and what, as respects any particular subject, should be the public policy.

As respects these market quotations, it may well be that Congress thinks it can better advance public policy by permitting their present restricted distribution, than by compelling a more general distribution thereof, and thus nullifying the plans and efforts of the commercial exchanges to properly safeguard, and prevent the illegal use of, their quotations, and that—considering the evils resulting from an unrestricted distribution—the high character of these exchanges is a sufficient guaranty against abuse or injustice in the dissemination of their quotations.

It is highly promotive of public welfare that the exchanges should assume the duty of safeguarding their quotations so as to suppress bucket shops. The only persons, other than bucket shops, requiring these continuous quotations are those who are engaged in the business of buying and selling the stocks covered by them, and bankers who loan on such collateral. Among such persons it is the self

interest of every exchange to give its quotations the widest possible distribution, as this increases the business of its members, which is one of the aims of every exchange.

What must be guarded against is the receipt of the quotations not only by bucket shops, but by those who conduct a small broker's office as a cloak in order to get quotations to secretly transmit to bucket shops throughout the country. To establish by legal proof that such persons wish the quotations for that improper purpose is often very difficult.

It being thus the duty as well as the interest of these exchanges to keep their quotations from being used in bucket shops, it was necessary for the exchanges and the distributing telegraph companies to lodge somewhere the power to decide, whether the quotations are sought for an illegal purpose. Because of their greater interest and better facilities for passing on this question, this duty is imposed upon the exchanges, and the fact that no forbidding statute has been passed, or even received serious consideration, shows that the exchanges have not exercised that right unfairly.

It therefore does not seem so "unthinkable" as the Public Service Commission suggests, that the exchanges have thus far been left by legislators the unrestricted right to determine, to whom their quotations should go.

Especially where, as here, no proof is tendered that the exchange has abused its discretion in rejecting the application, the courts should decline to interfere.

When, therefore, these quotations are transmitted

across state lines, the right of the Exchange to determine, to whom they shall go, is—at least until Congress shall act—so clear that it seems unnecessary to extend this brief by discussing the question, whether they are a kind of property, which may even by statute be impressed with a public use without violating the Federal Constitution.

The legislative intention to impress property with a public use should be clearly evinced, and is not manifested by a statute, like the Act to Regulate Commerce (or this state statute), which confers jurisdiction only over common carriers and only to prevent unjust discriminations and practices by them. If intended to authorize the commission to impair the property rights of others such statute would have provided a proceeding against such persons, in which they could be first heard.

The principle that only a legislative act can impress property with a public use is emphasized in Massachusetts by Section 333 of the Massachusetts constitution:

> "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

Hence this state, by compelling through its Public Service Commission and Supreme Court, the delivery of these quotations to Foster, would be taking without right the private property of the Exchange for the private use of Foster in violation of the Four-

teenth Amendment of the Federal Constitution requiring due process of law, as is held in

Mo. Pac. R. R. Co. v. *Nebraska*, 164 U. S. 403 (and cases cited),

Gt. Northern R. R. v. *Minnesota*, 238 U. S. 340,

unless an affirmative answer is given to the following question:

(2) Do these quotations, not being impressed with a public use while in the possession of the Exchange, become thus open to all when given to the telegraph companies?

If the Exchange is the distributor of the quotations through the agency of the Telegraph Company, a negative answer would seem to be unavoidable; for any other rule would make the news of associations like the Associated Press, and even private messages, open to all, which is at variance with the decisions.

Matthews v. *Associated Press, N. Y.*, 136 N. Y. 333.

State v. *Associated Press*, 159 Mo. 410.

The decisions of the Public Service Commission and State Supreme Court rest upon the proposition that by its contract with the Exchange the Telegraph Company acquired by purchase an *unlimited* ownership in the quotations, and that being thus possessed in its public capacity, the rule that common carriers must serve all alike applies to the distribution of the quotations, and they cite sundry decisions to the effect that equipment acquired by a carrier *for use in its service as a common carrier*, must be used for all alike, despite any restriction in the contract of purchase.

But this position is an erroneous one, because the Telegraph Company under this contract acquires, if any interest, only a restricted interest—a right to sell to certain designated persons; and when it has done this, its entire interest in the quotations is gone.

If the Telegraph Company be adjudged the seller of these quotations, it is not, in delivering them to these designated persons, acting in its public capacity as a common carrier, but merely as a dealer in news, and it should not be required to give to others what it has not itself legally acquired.

The Telegraph Company can only buy this news on the terms imposed by the Exchange, and the latter's right to impose such terms is expressly recognized in cases already cited.

Again the Telegraph Company, if the seller, is, as respects these quotations, within the principle that there are certain things a carrier may do, which are not subject to the rule—applicable to its service strictly as a common carrier—that all persons must be treated by it alike. Such things do not form a part of its public service, but are in the nature of accessories.

Thus a railroad company is not obliged to grant a person a right to construct an elevator upon its right of way, although it has already given others that privilege.

Mo. Pac. R. R. v. *Nebraska*, 164 U. S. 403.

Thus a railroad company is not obliged to allow all express companies to conduct an express business upon its road because it permits one to do so.

Express Cases, 117 U. S. 1.

Thus a railroad company may allow one person to use its depot as a cab-stand, or to travel on its trains for the purpose of soliciting from incoming passengers the transportation of themselves or their baggage without being under the obligation to grant the same privilege to others.

Donovan v. *Penn. Company*, 199 U. S. 279.
Old Colony R. R. v. *Tripp*, 147 Mass. 35.
Sargent v. *Boston & Lowell R. R.*, 115 Mass 416.

The Pullman Company, though a common carrier in its sleeping car service, is not such as respects its business of manufacturing cars. A state has no right to fix the price, at which it should sell its cars. A railroad company when authorized to mine coal for sale is not a common carrier as respects its coal business.

So, a telegraph company, although a common carrier, as respects the transmission of messages for hire, is not such in its purchase and sale of news.

Bradley v. *Telegraph Co.*, 8 Ohio Dec. Reprint 708.
Sterrett v. *Telegraph Co.*, 18 Weekly Notes of Cas. (Penn.) 77.

The *Bradley* case involved the distribution of the quotations of the Chicago Board of Trade, and arose before the making of the contract involved in 127 Ill. 153 (referred to on p. 22 of this brief), and while the telegraph company, through its employes, was collecting this news on the floor of the exchange, and the court (Judge MAXWELL) in denying an injunction against the telegraph company, the only defendant, said:

"This business of collecting and furnishing 'commercial news' is entirely separate and distinct from the business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers. * * * The law of bailment is the foundation of the law governing common carriers, and the ordinary definition of bailment is, a delivery of something of a personal nature by one to another upon a contract, express or implied, that that other will dispose of the thing according to the instructions given him. * * * But in this case, the quotations collected by the defendant are its own property until delivered into the possession of the plaintiff, and are not in any sense the subject of bailment. I am not aware of any adjudicated cases on the subject, but it seems to me clear on principle, that in collecting and furnishing the quotations which are the subject of this controversy, the defendant was engaging in a business entirely distinct from its public duties."

(See also *Chesapeake Tel. Co.* v. *Manning*, 186 U. S. 238, 247.)

Appellees, however, contend that the Telegraph Company by this contract acquires a greater interest than above stated, because of the provision of the contract that "it is the intent only to prevent the unlawful or improper use of the quotations." This provision must be read and harmonized with the provision of the contract, which expressly confers upon the Exchange the right to decide what persons should have or retain the quotations. Thus considered, this clause is merely a declaration, as between the Exchange and the Telegraph Company of the

motive, with which the Exchange is to act when deciding upon applications, and does not negative the right given it to decide, who shall come into confidential relations with it.

This declaration of motive is not merely that the Exchange should, before refusing the quotations, be convinced that the *applicant* intends to conduct a bucket shop with the quotations. It is "to prevent the unlawful or improper use of such quotations," which clearly permits the Exchange, without violating the intent of the contract, to refuse the quotations, whenever in its judgment giving the quotations to an applicant will result either in his improper use of them, or in his giving them to a bucket shop.

Hence, whatever be the construction given to its contract with the Telegraph Company, the Exchange may withhold its quotations from appellee Foster, and the order of the Public Service Commission will deprive the Exchange of its property without due process of law.

Thus this record presents three Federal questions within section 24 of the Judicial Code, each of which is sufficiently real and substantial to confer jurisdiction upon the District Court.

IV.

THERE SHOULD BE A REVERSAL WITH DIRECTIONS TO ENTER A FINAL DECREE FOR APPELLANT.

As the bill states a case within the jurisdiction of the District Court, and a reversal on this ground is necessary—the next question is, what instructions should accompany this reversal?

Had the dismissal been only for want of jurisdiction, this court could only reverse with directions to exercise jurisdiction.

But the learned District Judge reached the conclusion, not only that there was no Federal question to sustain jurisdiction, but also that upon the face of the bill the Commission's order correctly solved the controversy of these parties, and being so minded, he dismissed the case for both want of jurisdiction and want of equity.

There is, of course, some inconsistency in denying jurisdiction, and then proceeding to decide the case; but decrees of this kind are sometimes entered (*Darnell* v. *Ill. Cen. R. R.*, 190 Fed. 656), and have practical merit for the reason that thereby—when the trial court is against the plaintiff both upon the jurisdiction and the merits—all important questions in the case may be decided in *one* appeal.

The present appeal, involving, as it does, the construction of the Constitution, rests on that ground, as well as on that of jurisdiction.

Upon such an appeal the case is here for a decision upon all questions.

Chappell v. *U. S.*, 160 U. S. 499, 509.
Miss R. R. Com. v. *L. & N. R. R.*, 225 U. S. 272, 279.

Paragraph 12 of the bill claims that these quotations constitute property of the Exchange, and that it could select the persons, to whom it would furnish them, and avail itself of the services of any common carrier for the purpose of delivering them to such persons.

Judge Dodge also decided that this claim is unfounded, following like decisions in

Tucker v. *Tel. Co.*, 156 N. Y. Supp. 1148.

Western Union Tel. Co. v. *Foster*, 224 Mass. 365.

Such being the state of this record, and the fixed attitude of the trial judge, it would seem like sacrificing substance to form for this court to reverse on the jurisdictional question and leave undecided the important question here discussed under Point III.

The probable result is liable to be that the trial judge, having in effect held the bill bad on demurrer, will re-enter the present order of dismissal with the words "for want of jurisdiction" erased therefrom, and thus compel appellant to come here again upon practically the same record as the present one.

On the other hand, if this court will now decide the question presented under Point III, there would be no second appeal to this court.

For if this court shall decide adversely to the Exchange's right to have the distribution of these quotations confined to persons whom it approves, the case should go back for trial of the issue of fact arising out of the allegation that Foster desires the quotations for bucket-shop purposes.

But if this court should decide in favor of this right of the Exchange, then the case would be ripe for a reversal directing a final decree enjoining the Telegraph Company from delivering, and Foster from receiving, these quotations until Foster's application therefor shall have been approved by the Ex-

change, and also enjoining the Commission from enforcing its order.

For the answers of the Telegraph Company and Foster both admit the making of the contract between the Exchange and the Telegraph Company, that the quotations are distributed thereunder, that Foster's application for the quotations has been disapproved by the Exchange, and that at the time this bill was filed appellee Foster was about to coerce the Telegraph Company into delivering him the quotations in violation of its contract with the Exchange; and the answer of the Telegraph Company admits (Rec., 40) that it intends to furnish these quotations to Foster as soon as the order of the Commission shall become operative; while the answer of the Commission admits the contract of the Exchange with the Telegraph Company, the facts showing distribution thereunder to be interstate commerce, its order and the proceedings resulting in such order and its purpose to enforce such order. These admissions establish the complianant's case, if the Exchange's control of the quotations is sustained.

It is true that the answers of Foster and the Commission contain affirmative averments (in the nature of a plea in bar) claiming that the order of the Commission and the confirming order of the Supreme Court are *res adjudicata* against the Exchange upon the grounds: (1) that under its contract with the Telegraph Company the Exchange had the right to intervene in the proceeding and had notice and knowledge of such proceeding in time to do so; and (2) that a committee of the Exchange accompanied by its counsel in fact appeared before the Commis-

sion "at a *preliminary hearing* held to discuss future proceedings." As pleadings are to be taken most strongly against the pleader, this is equivalent to an averment that the Exchange appeared only at this preliminary hearing, and did not become a party to, or participate in any way in, the hearing before the Commission. And this is confirmed by the opinions of the Commission and the Massachusetts Supreme Court, from each of which it appears that the Stock Exchange neither became a party to the proceeding, nor was represented at the hearing before the Commission.

But this affirmative defense is without merit for two reasons:

(1) A contract right or other privilege of a person to intervene in a case, unless exercised, does not make him a party to, or bound by, the resulting judgment.

Hunt v. *Cotton Exchange*, 205 U. S. 322.
(See that case on p. 14 of this brief.)

To the same effect
Carson v. *Knapp*, 80 Iowa 617.

Especially is this true when he claims that the tribunal is without jurisdiction.

Nor is the Exchange bound because, being denied the right to argue orally, it filed a brief—presumably as *amicus curiae*—in the State Supreme Court.
Stryker v. *Goodnow*, 123 U. S. 527, 540.

(2) The Commission being without jurisdiction, the Exchange was certainly not obliged to intervene, and this order would not be *res adjudicata*, even if it had intervened.

Equally without merit is the defense set up in the answers of appellee Foster and the Commission (Rec., 42),—but perhaps not seriously insisted upon —that the contract between the Exchange and the Telegraph Company, if construed as appellant contends, is void because it provides an unlawful rebate under the Act to Regulate Commerce.

There can be no illegal rebate, unless the carrier thereby discriminates between two or more receiving the same or a similar service. But there is here no other person receiving the same service. Nor is the provision for the payment to the Exchange of $50,000 a rebate. The traffic charge is what the Telegraph Company gets in excess of this sum.

All telegraphic service is not to be paid for at the same rate. Section 1 of the Interstate Commerce Act provides that "messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates as may be prescribed for the different classes of messages."

The service of transmitting market quotations differs, in the manner of its delivery to the carrier, as well as in the manner of its delivery by the carrier, from any other kind of telegraph service. The amount of such service rendered to each exchange is different.

Again a complete answer is, that complaints of this kind will not avail a person until the rate has been condemned by the Interstate Commerce Commission, whose jurisdiction of such matters is ex-

clusive. Until then, courts may not give or deny relief upon the ground that the transaction is an unlawful rebate. (See *Robinson* v. *B. & O. R. R.*, 222 U. S. 506, and cases cited at pp. 40, 41, of this brief.)

Thus, in conclusion, it is respectfully submitted:

(1) That this transmission of these quotations is interstate commerce;

(2) That this order of the Commission is void, for want of jurisdiction in the Commission, and its enforcement will deprive the Exchange of its property without due process of law;

(3) That a like deprivation of property will result, because under its contract with the Telegraph Company the Exchange remains so far owner of the quotations, that it may—at least in the absence of affirmative legislation by Congress impressing them with a public use—have these quotations withheld from any person, whose application therefor it has not approved;

(4) That because of these federal questions the District Court had jurisdiction;

(5) That the admitted facts in this record are such, and the defenses interposed are so unsubstantial, that this case should be reversed with directions to enter a decree for complainant.

Respectfully submitted,

HENRY S. ROBBINS,
For Appellant.

WALTER F. TAYLOR,
Counsel.

APPENDIX.

THE MATERIAL PARTS OF THE MASSACHUSETTS STATUTE CREATING THE PUBLIC SERVICE COMMISSION:

Sec. 1 increases the number and changes the name of an existing Board.

"Sec. 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services:

a. The transportation or carriage of persons or property, or both, between points within the common wealth by railroads, street railways, hereinafter called railways, electric railroads, and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads or steamships.

b. The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or by whomsoever

provided, whether the service be common carriage or merely in facilitation of common carriage.

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

Sections 3, 4, 5, 6, 7, 8, and 9, make certain changes (immaterial here) in existing laws.

"Section 10. The commission may inquire into the rates, charges, regulations, practices, equipment and services of common carriers in this commonwealth and elsewhere rendering any service of a kind subject to its jurisdiction. It may be represented at any public hearings before any legislative committee or public board in this commonwealth, or of any other state or of the United States, with respect to any proposed legislation or action by public authorities within or without the commonwealth affecting any public service within the commonwealth subject to its supervision, whenever in its opinion such representation is desirable in the interests of this commonwealth. It may apply by petition to the interstate commerce commission for relief, and may present evidence and arguments to the said commission, in any case in which it is of opinion that a common carrier subject to its supervision is violating any provision of the interstate commerce law or any valid order or regulation made under authority thereof. The commission may also confer with or appear before boards of other states

having powers over any of the common carriers rendering public services of the kind hereinbefore described, when in its judgment the interests of the commonwealth will be promoted thereby."

Sections 11, 12, 13, 14, 15, 16, confer authority to examine books, prescribe forms of account, enter upon premises for the purposes of inspection, etc., authorize re-valuation of property and provide for the issuance of securities by railroad companies.

Sections 17, 18, 19, 20 and 21 require all charges or rates by a common carrier to be just and reasonable, provide for the printing of schedules of rates, etc., exact conformity to such schedules, prohibit discrimination therein, and provide a method for affecting a change in such schedule of rates.

Section 22 empowers the commission to declare the existing rates, fares or charges of any common carrier subject to its jurisdiction, or the regulations or practices of such common carrier affecting such rates, unjust, unreasonable, unjustly discriminatory, or unduly preferential, and to determine by an order the just and reasonable fares, rates and charges to be charged, and makes it the duty of every such common carrier to obey such order.

"Section 23. Whenever the commission shall be of opinion after a hearing had upon its motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be ob-

served, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The commission shall have power after such hearing to order from time to time that a railroad company shall operate its lines, or standard gauge, or such parts thereof as the commission shall prescribe, by electric power instead of by steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the commission shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the commission of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. It shall be the duty of every such common carrier to observe and obey every requirement of every such order served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employes."

Sections 24 and 25 confer power to prescribe the number of men forming a train crew, and to establish through rates.

"Section 26. Every order of the commission shall

be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served under the laws of this commonwealth. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification shall be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person or corporation upon whom it is served shall, if so required in the order, notify the commission in like manner whether the terms of the order are accepted and will be obeyed. Every order of the commission shall take effect at a time therein specified, and shall continue in force either for a period which may be designated therein, or until changed or abrogated by the commission."

Section 27 confers jurisdiction in equity upon the Supreme Judicial Court "to review, annul or modify any orders of the commission, which are unlawful to the extent only of such unlawfulness."

Section 28. The Supreme Judicial Court shall have jurisdiction upon the application of the commission to enforce all valid orders of the commission and all the provisions of this act. Whenever the commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or

about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary or in violation of the law or any order of the commission, it shall direct counsel to the commission to begin, subject to the supervision of the attorney general, an action or proceeding in the Supreme Judicial Court in the name of the Commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

Section 29 relates to repeal of former acts, etc., and when the act shall go into effect.

Office Supreme Court, U. S.
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CLERK.

No. 420.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

HENRY G. S. NOBLE, as President of the New York Stock Exchange,
Appellant,
vs.
THE UNITED TELEGRAM COMPANY, CALVIN H. FOSTER, and the Members of the Public Service Commission of Massachusetts,
Appellees.

BRIEF FOR APPELLANT.

WALTER F. TAYLOR,
COUNSEL.

HENRY S. ROBBINS,
FOR APPELLANT.

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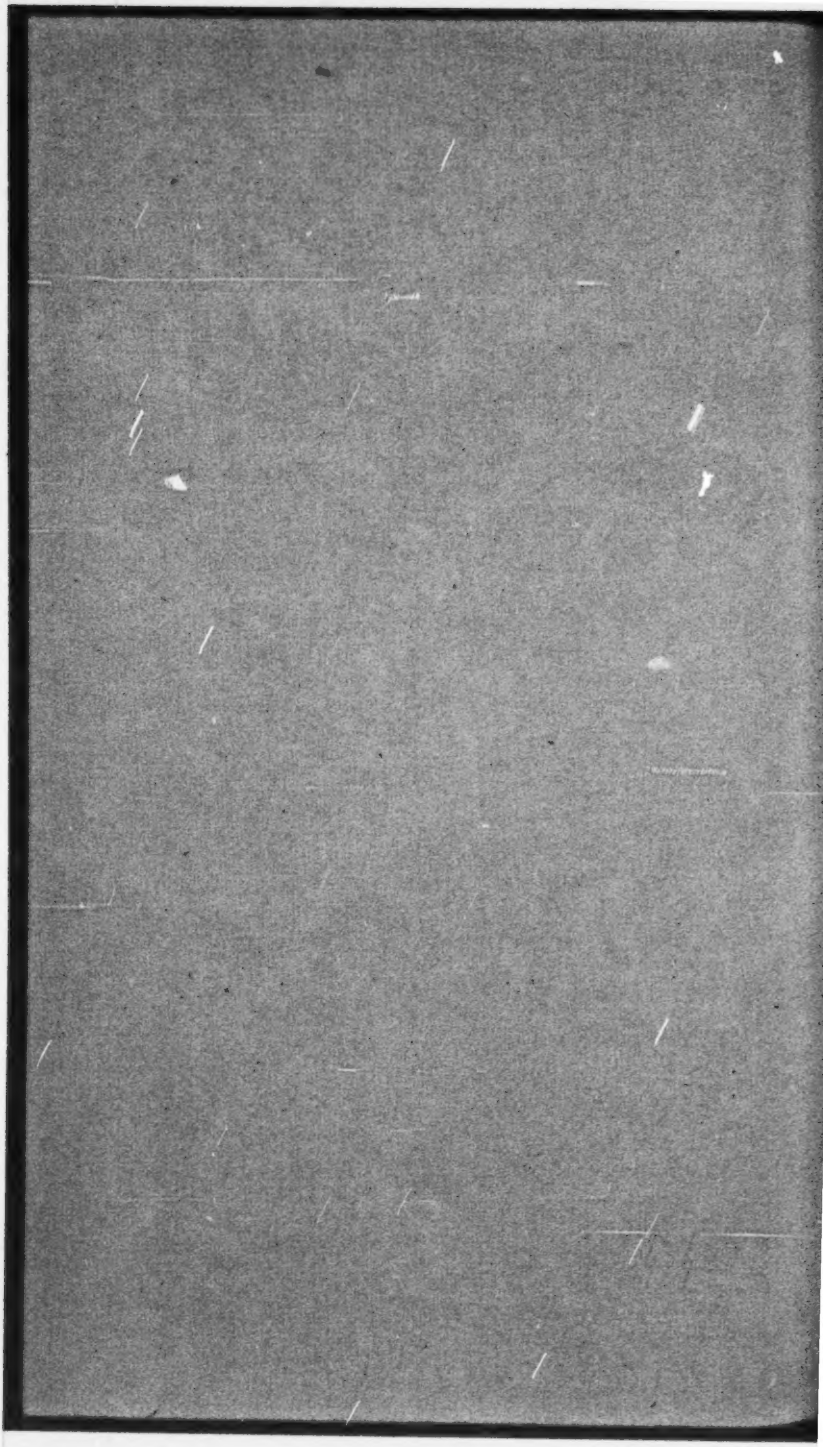

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No. 420.

BRIEF FOR APPELLANT.

STATEMENT.

This case and Case No. 419 are companion cases, the only differences being (1) that in each case a different telegraph company is made a defendant, and (2) that the quotations are furnished by the Stock Exchange to the present appellee, the United Telegram Company, upon a ticker in the New York office of the Postal Telegraph Cable Company, and are thence sent by this Telegram Company over a wire of the Postal Company to the office of the Telegram Company in Boston, whence they are re-transmitted to its ticket-customers in Boston, while in case num-

ber 419 the quotations are furnished by the Stock Exchange to the telegraph company in the Stock Exchange's building, and are thence transmitted by that telegraph company over its own wires to its office in Boston, whence they are re-transmitted in the same manner to its ticker customers in Boston.

As these minor variations do not change the legal questions presented, the decision by this court of case Number 419, will be conclusive of the case at bar. Hence no brief seems necessary in this case.

Respectfully submitted,

HENRY S. ROBBINS,
For Appellant.

WALTER F. TAYLOR,
Counsel.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1917

HENRY G. S. NOBLE as PRESIDENT of the NEW YORK STOCK EXCHANGE
APPELLANT
VS.
WESTERN UNION TELEGRAPH COMPANY, CALVIN H. FOSTER and THE MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS
APPELLEES
No. 419

HENRY G. S. NOBLE as PRESIDENT of the NEW YORK STOCK EXCHANGE
APPELLANT
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THE UNITED TELEGRAM COMPANY, CALVIN H. FOSTER, and THE MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS
APPELLEES
No. 420

BRIEF FOR APPELLEE CALVIN H. FOSTER

PATRICK HENRY KELLEY
Attorney for
CALVIN H. FOSTER

SUPREME COURT OF THE UNITED STATES

No. 419

HENRY G. S. NOBLE, as President of the NEW YORK STOCK EXCHANGE

APPELLANT

vs.

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APPELLANT

vs.

THE UNITED TELEGRAM COMPANY, CALVIN H. FOSTER, et al

BRIEF FOR CALVIN H. FOSTER

STATEMENT OF THE CASE

These cases are now pending in this Honorable Court on an Appeal from the District Court of the United States for the District of Massachusetts, to review final Decrees which dismissed two Bills in Equity filed by the Appellant to prevent the Western Union Telegraph Company in case No. 419, and the United Telegram in case 420, from complying with and obeying final Decrees which were entered in the Supreme Judicial Court of Massachusetts and which enjoined the Telegraph Companies from further unlawful discrimination against Calvin H. Foster (one of the Appellees) by with-holding from the said Foster the Stock Ticker

Service, which service the Telegraph Companies were furnishing to their subscribers in Boston.

The history of the litigation which ended in the State Court in favor of Foster, is set forth in the Brief filed by the said Foster in cases now numbered 274 and 275 October term 1917.

The Bills were dismissed for want of Equity appearing in the Bill, and for want of Jurisdiction; the question as to Jurisdiction has been certified by Mr. Justice Dodge in accordance with the provisions of Section 238 of the Judicial Code; the questions raised by the Appeal are now before this Honorable Court to be disposed of.

After the cases were entered in the Clerk's Office of the Supreme Court of the United States, the Appellant filed a Motion that the cases be advanced for argument with the said Cases No. 274 and 275 which Motion was allowed.

ARGUMENT SHOWING THAT THE APPELLANT IS NOT NOW ENTITLED TO HAVE THIS HONORABLE COURT PASS UPON AND DETERMINE THE PARTICULAR QUESTIONS RAISED BY THE APPEAL, AND THAT THE APPEAL SHOULD NOW BE DISMISSED.

From the Bill of Complaint in Case No. 419, it appears that the Appellant attacked the Final Decrees which were entered in the State Court upon two grounds, First; that the order of the Public Service Commission which was affirmed by the Decrees of the Supreme Judicial Court of Massachusetts constituted the taking of property without due process of law under the Federal Constitution, and Second; that the Public Service Commission had no jurisdiction to make such order because the subject matter of the litigation being Interstate Commerce, was within the sole Jurisdiction of the Interstate Commerce Commission.

It is manifest that in order to entitle the Appellant to the aid of the Federal District Court in suspending the operation of the Final Decrees entered in the proceedings in the State Court that it was necessary for the Appellant to allege in its Bill of Complaint that the Telegraph Companies intended to or were compelled to accept the decision of the State Court as final; and hence we find that both of the Bills filed in the District Court by the Appellant did contain an equivocating allegation of that character, to wit, —

"Your orator is informed and therefore charges that the said Telegraph Company intends to and will comply with said order of said Public Service Commission as soon as said confirming order of said Court becomes operative, and will in obedience to said order furnish the said Foster with the said quotations." (See Bill of Complaint, Record Page 8, Case 419, Paragraph 11.)

In the answer filed by each of the Telegraph Companies all the allegations of the Bill were confessed; every allegation in the Bill of Complaint whether of fact, belief or intent being expressly admitted as alleged. (This is strong evidence of pre-arrangement between the Stock Exchange and the Telegraph Companies.)

After the Telegraph Companies had filed their answers in the Federal District Court which impliedly admitted that they had no intention to apply for or to procure a Writ of Error and Supersedeas in the proceedings in the State Court suspending the operation of the Final Decrees, they nevertheless quickly abandoned their alleged intentions and did immediately bring the said Decrees before this Honorable Court for review by Writ of Error; and it also appears that a Supersedeas was issued by the State Court suspending the operation of said final Decrees until the questions raised by the said Writs of Error had been finally determined by the Supreme Court of the United States.

From the foregoing statement it is apparent that this Honorable Court is under no obligation or duty to now pass upon the particular questions raised by the Appeal, as the relation and conduct of the Telegraph Companies

and the Apellant Stock Exchange has been of such a character that the Appeals in these two cases ought to be dismissed; and as grounds therefor the Appellee assigns the following matter, which appears by the Record; the Appellant Stock Exchange set forth and annexed to its Bill filed in the District Court, a copy of the Contract dated July 1, 1914, thereby making the said contract a part of the pleadings.

By reading the said contract which is set forth in the record in case No. 419 beginning with the last paragraph on page 32, and extending to page 33, the following provisions will be found:—

Page 32. "In case any suit or legal proceeding is brought to enjoin the Telegraph Company from refusing to furnish the quotations to any person, the Telegraph Company shall at once inform the Exchange of such suit or proceeding, and shall permit the Exchange to intervene therein, or to defend the same in the name of the Telegraph Company; but in such cases the Exchange shall indemnify the Telegraph Company against and save it harmless from any and all costs and damages awarded against it.

Page 33. In case the Exchange institutes any suit or proceeding to enjoin any person not entitled to said quotations from obtaining or using the same, the Telegraph Company will co-operate with and assist the Exchange in its prosecution; and whenever requested so to do by the Exchange, and indemnified against any cost or liability which it may thereby incur, it will institute in its name, or permit the Exchange to institute in the name of the Telegraph Company, any action or proceeding to prevent any person not entitled to said quotations from obtaining or using the same."

From the provisions of the contract above set forth, it conclusively appears that the Appellant had at all

times an absolute right to control the defence of the suits in the State Court. either by direct intervention in its own name or by defending in the name of the Telegraph Company and by its own chosen counsel; in other words, in defending suits of the Foster kind, and in relying upon its contract with the Exchange as a defence, the Telegraph Company was acting merely as an agent, its principal being the Stock Exchange. The record of the proceedings in the State Court shows that the Stock Exchange had full notice of the proceedings as it filed a brief with the Supreme Judicial Court at the argument in that Court and before the final Decrees had been entered. After the final Decrees were entered in the State Court the Appellant had a right under the contract to compel its agent, the Telegraph Company, to procure a Writ of Error, and to apply for a Supersedeas suspending the operation of the final Decrees until the case had been passed on by the Supreme Court of the United States; and if the Telegraph Company at any time had refused to comply with any such request the Appellant could have specifically enforced its right under the contract by taking appropriate proceedings.

There is no allegation in the Bill of Complaint filed in the District Court which charges that the Telegraph Company violated any of the provisions of the contract by refusing to follow the instructions of the Stock Exchange in defending the suit in the State Court; nor is there any allegation of a refusal by the Telegraph Company to apply for a Writ of Error and Supersedeas in order to suspend the operation of the final Decrees in the State Court; nor is there any allegation in the Bill that a Writ of Error and Supersedeas had ever been applied for or refused before the Bill had been filed in the District Court.

The exact situation which has developed as a result of the conduct of the Stock Exchange and the Telegraph Company is this; that whether it had or had not such intention at the time the Bill was filed by the Stock Exchange in the District Court, the Telegraph Company did thereafter procure an order from the

State Court suspending the operation of the final Decrees entered by the State Court and by Writ of Error has brought the case before this Honorable Court for its Determination; the Telegraph Company in prosecuting such Writ of Error must be presumed on the record to be acting as the agent of the Stock Exchange and in accordance with the provisions of the contract above set forth; it is apparent therefore that the validity of the Decrees entered in the State Court are attacked by both principal and agent on the same identical grounds by the Writs of Error and the Appeals now pending in the Supreme Court of the United States.

If the final Decrees of the State Court in the suits numbered 274 and 275 are affirmed or the Writs of Error dismissed by the Supreme Court of the United States, such result will operate as a bar to all further prosecution of the suits instituted in the District Court.

Hart Steel Co. vs. Railroad Supply Co., 244 *U. S.* 294 (62;1148).

As the sole object of the suits instituted in the Federal District Court by the Stock Exchange was to enjoin the enforcement of the final Decrees entered in the State Court until the validity of the said Decrees had been finally established as being in conformity with the Constitution and laws of the United States, and as it appears by the record that the entire scope, object and purpose of the suits filed in the District Court has been actually accomplished by the proceedings taken by the Telegraph Company in procuring the Writ of Error and the Supersedeas from the State Court it necessarily follows that the Appeals in the cases number 419 and 420 should be dismissed as the particular questions raised by the Appeal have now become merely moot questions which no longer call for a decision by the Supreme Court of the United States.

Singer Mfg. Co. vs. Wright, 141 *U. S.* 696 (35; 906).

Dakota Co. vs. Goodwin, 113 *U. S.* ~~222~~ 222 (28; 981).

Selden vs. Montague, 194 *U. S.* 153 (48;915).
Fisher vs. Baker, 203 *U. S.* 174 (51;142).

It is respectfully submitted that these Appeals be dismissed for the reasons above assigned.

PATRICK HENRY KELLEY,
Attorney for Calvin H. Foster

In the Supreme Court of the United States.

OCTOBER TERM, 1917

No. 419

HENRY G. S. NOBLE,

As President of the New York Stock Exchange

APPELLANT,

v.

WESTERN UNION TELEGRAPH COMPANY, CALVIN H. FOSTER

And the Members of the Public Service Commission of Massachusetts

APPELLEES.

BRIEF FOR THE MASSACHUSETTS PUBLIC SERVICE COMMISSION.

H. WARE BARNUM,
Assistant Attorney-General,
Of Counsel.

HENRY C. ATTWILL,
Attorney-General,
For the Massachusetts Public Service Commission.

In the Supreme Court of the United States.

October Term, 1917.

No. 419.

HENRY G. S. NOBLE, as President of the New York Stock Exchange, *Appellant*,

v.

WESTERN UNION TELEGRAPH COMPANY, CALVIN H. FOSTER *et al.*, *Appellees*.

BRIEF FOR THE MASSACHUSETTS PUBLIC SERVICE COMMISSION.

STATEMENT.

As to the Massachusetts Public Service Commission this is a suit to enjoin enforcement by them of an order entered in their official capacity, on the ground that its enforcement would deprive the complainant of property without due process of law.

On motion the bill was dismissed for lack of jurisdiction, appeal taken and the following question certi-

fied to this court in pursuance of section 238 of the judicial code:

> Whether the bill in this case presents a controversy which arises under the Constitution or laws of the United States, within the meaning of section 24 of the judicial code? (Rec., p. 63.)

It is conceded that jurisdiction on the ground of diversity of citizenship does not exist. (Rec., p. 55.)

On the allegations of the bill it appears that the Stock Exchange collects quotations of sales made on the exchange, which it delivers to the respondent Western Union Telegraph Company under a contract, one of the terms of which is that the Western Union shall not "furnish quotations by ticker or otherwise in the volume of a continuous service, which is defined to be oftener than at intervals of fifteen minutes, to any subscriber therefor who shall not have signed in duplicate an application therefor addressed to the telegraph company, and who shall not have been approved by the Exchange." (Rec., p. 3.)

The contract further provides: "It is understood and agreed that as to the right of the Exchange hereinbefore specified to disapprove applicants for quotations, and to require the discontinuance of the furnishing of such quotations on notice given by it, it is the intent only to prevent the unlawful or improper use of such quotations." (Rec., p. 34.)

The respondent Foster applied to the Western Union in regular course for this service of continuous quotations by ticker. The Stock Exchange refused to approve his application, whereupon Foster applied to the Massachusetts Public Service Commission for an order requiring that the service be rendered. (Rec., p. 36.)

The Public Service Commission entered an order as follows:

> It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is
>
> *Ordered*, That the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company shall forthwith remove said discrimination. (Rec., p. 50.)

Suit was brought in the Supreme Judicial Court of Massachusetts by the Public Service Commission to compel compliance with the foregoing order, one of the prayers in which was that the telegraph company be enjoined to furnish said Foster the quotations by means of ticker service upon his making due payment therefor. (Rec., p. 7.)

Final decree in said suit was entered to the effect that the telegraph company "be commanded and enjoined forthwith to comply with the following" (foregoing) "order of the Public Service Commission." (Rec., p. 54.)

Thereafter the present bill was filed. The Public Service Commission originally were not made parties, but were later summoned in.

Most of the questions argued in the plaintiff's brief are raised in cases Nos. 274 and 275, to be argued with this case, and are dealt with in brief for the Public Service Commission filed therein. In behalf of the Public

Service Commission it is further submitted in this case that no Federal question is involved because

(1) The order of the Public Service Commission and decree of court in enforcement thereof do not necessarily affect any property right of the complainant.

(2) The clause of the contract by which the telegraph company agrees to furnish its service only to persons approved by the Stock Exchange is void so far as it prevents the telegraph company from serving the public without discrimination.

I.

Order of the Public Service Commission and decree of court do not affect any property right of complainant.

The only claim for the existence of a Federal question that has been suggested is that the Stock Exchange has been or is about to be deprived of property without due process of law. The reply of the Public Service Commission to this proposition is, in brief, that nothing has been done by them or threatened by them which in any way involves the property rights of the Stock Exchange. There is no allegation of any direct interference by the Commission with property, the only allegation being the institution of a suit in court.

Assuming for the purposes of this argument (but without admitting) that an agreement of the telegraph company to furnish service only to persons approved by the Stock Exchange is wholly valid, the order of the Commission and decree of the court in no way attacked or injured this property right, either with or without due process of law. The order of the Public Service

Commission to the telegraph company is to remove the discrimination. The decree of the court simply requires compliance with this order.

The telegraph company can remove the discrimination, and thereby comply both with the order and the decree, in one of two ways: It may, if it has or can acquire the right to do so, furnish a ticker and the quotations to Mr. Foster by exercising the rights which it now has, if they are sufficient, or by acquiring such right from the Stock Exchange, if it does not already have the right. It may also comply with the order and decree by ceasing to give to others in Massachusetts the service which it denies to Mr. Foster; or, in other words, by going out of that line of business in Massachusetts.

There is nothing in the contract between the Stock Exchange and the telegraph company which in any way makes it the duty of the telegraph company to distribute the information to any person or place in Massachusetts.

There is conceivably a third possibility, to wit, that the telegraph company, if it does not have or cannot secure the right to serve quotations to Foster, may violate the rights of the Stock Exchange and furnish the quotations to Foster without its consent; but it requires a stretch of the imagination to say that the order of the Public Service Commission or of the court compels or requires such a supposedly illegal act when two lawful courses are open to it.

The bill of complaint alleges that the Western Union is about to furnish the information to Mr. Foster without right. There is no question of the jurisdiction of a court of equity to pass on such a dispute between the New York Stock Exchange and the Western Union

Telegraph Company, but such a case presents no Federal question.

The determination of the Western Union to choose the alternative of furnishing quotations to Mr. Foster in violation of alleged rights of the Stock Exchange rather than ceasing to carry on that line of business in Massachusetts, or of acquiring from the Stock Exchange the right to furnish the quotations to Foster, is the voluntary intentional act of a responsible free agent for which the action of the Public Service Commission and the decree of the Massachusetts Supreme Court are not responsible.

Stated in another way, the order of the Public Service Commission and decree of the court cannot be regarded as the legal or proximate cause of the threatened injury to the complainant.

It is well established that the intervention of a free, voluntary and responsible agency in the chain of succession of events breaks a causal connection.

Milwaukee, etc., Ry. Co. *v.* Kellogg, 94 U. S. 469, 475.

Goodlander Mill Co. *v.* S. O. Co., 63 Fed. 400 (C. C. A. 7, 1894).

Alexander *v.* Town of New Castle, 115 Ind. 51.

"If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Per Miller, J., in Insurance Co. *v.* Tweed, 7 Wall. 44, 52.

C., B. & Q. Ry. Co. *v.* Richardson, 202 Fed. 836 (C. C. A. 8, 1913).

Vicars *v.* Wilcocks, 8 East, 1.

If the Stock Exchange has any standing in this court to maintain the present bill it amounts to holding that the Stock Exchange was an indispensable party to such proceedings as were instituted before the Massachusetts commission and in the Massachusetts court, using "indispensable party" in the sense in which that term is employed in the Federal decisions. This point was expressly considered by the Massachusetts court and rejected.

> Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, at 374.

A party is indispensable only when his rights are directly and necessarily affected by the decree which is entered.

> Waterman *v.* Canal-Louisiana Bank Co., 215 U. S. 33, 47.
> Coiron *v.* Millaudon, 19 How. 113.
> Williams *v.* Bankhead, 19 Wall. 563, 571.
> Ribon *v.* Railroad Cos., 16 Wall. 446.
> Shields *v.* Barrow, 17 How. 409.
> United States *v.* Allen, 179 Fed. 13.

In Waterman *v.* Canal-Louisiana Bank Co., *supra*, at page 49, it is said:

> The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party.

The holder of a stock certificate issued on surrender of a certificate having thereon a forged assignment is not a necessary party to a suit by the real owner against

a corporation, praying for the issuance of a new certificate.

Pratt *v.* B. & A. R.R. Co., 126 Mass. 443.
Chicago Edison Co. *v.* Fay, 164 Ill. 323.
Telegraph Co. *v.* Davenport, 97 U. S. 369.

It would hardly be claimed that the holder of such a certificate would become a necessary party merely because the corporate defendant refuses to recognize such rights as he may have.

It is argued that the order of the Commission and the court cannot reasonably be interpreted as other than directly compelling the telegraph company to give the quotations to Foster.

It is to be observed that both in Foster's application to the Public Service Commission and in the prayer of the bill filed by the Public Service Commission in the Supreme Judicial Court it was requested that such an order be made. The fact that the order prayed for in each instance was not entered, but instead the decree made that the discrimination should be removed, would seem clearly to indicate that it was intended to leave certain alternatives open to the telegraph company. An order in form to remove discrimination is that commonly entered by the Interstate Commerce Commission, and is recognized as leaving optional courses open.

St. L. S. W. Ry. Co. *v.* United States, 245 U. S. 136, at 145.

If the order of the Public Service Commission and the decree of the court had been in effect that the telegraph company should cease conducting this business in Massachusetts, palpably the Stock Exchange would

not have been affected. If no other course is legally open to the Western Union, and it has not or cannot acquire the right to furnish the quotations to Foster, that is the legal effect of the order and decree entered. Such a decree, however, would have been unfair to the telegraph company because it would have closed the door upon any attempt to acquire from the Stock Exchange the right to serve Foster, and consequently the decree in the present form was entered.

Complainants regard as "fantastic" the suggestion that the order can be interpreted as requiring the telegraph company to cease doing this business in Massachusetts. Such an alternative, however, has been regarded as proper by some courts in similar cases. In Delaware & A. Tel. & Tel. Co. *v.* State of Delaware, 50 Fed. 677, it is said, by Butler, D. J., at page 679:

> "Nor does it help the respondent to say that the license could not be obtained on other terms. If not, it could have been declined. Had it been, and the business avoided, the responsibilities which attend it would also have been avoided."

In State *v.* Telephone Co., 36 Ohio St. 296, it is said:

> "The Columbus Telephone Company was bound to acquire from the American Bell Telephone Company such rights in its instruments and patent (or to provide itself by other means of all such facilities), as were necessary to discharge its duties to the public, as prescribed in the statute; otherwise, it had no right to engage in the business of operating a system of telephones at all."

It is also suggested that discontinuing such business would violate contracts between the Western Union Telegraph Company and its present customers. So far

as the existence of such contracts can be inferred from the record, they are open to cancellation at will. (Rec., pp. 3, 30.)

II.

THE CLAUSE OF THE CONTRACT BY WHICH THE TELEGRAPH COMPANY AGREES TO FURNISH ITS SERVICE ONLY TO PERSONS APPROVED BY THE STOCK EXCHANGE IS VOID SO FAR AS IT PREVENTS THE TELEGRAPH COMPANY FROM SERVING THE PUBLIC WITHOUT DISCRIMINATION.

Although it may be admitted that in general the Stock Exchange, having a property right in its quotations collected by it, can keep the information so collected to itself or license others to disclose the information subject to such restrictive covenants as the Stock Exchange may see fit to impose, it by no means follows that it can exact from a public service corporation a covenant which will prevent such corporation from performing its public duties as defined by common law or created by valid statutory enactment.

This phase of the case is dealt with in the brief filed in cases Nos. 274 and 275. The following cases are authority for the proposition that any such restrictive covenant is void:

Commercial Union Telegraph Co. *v.* New England Tel. & Tel. Co., 61 Vt. 241.

Chesapeake & Potomac Telephone Co. *v.* B. & O. Telegraph Co., 66 Md. 399, 416.

Bell Tel. Co. of Philadelphia *v.* Commonwealth *ex rel.* B. & O. Tel. Co., 3 Atlantic, 825.

Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 293.

The Stock Exchange has granted to the telegraph company, with knowledge of the public character of the business in which it is engaged, the right to distribute this information by ticker and otherwise. Having so parted with it, the property becomes subject to all obligations which the law, from reasons of public policy attaches to property devoted to a public use.

Louisville & Nashville R.R. Co. *v.* United States, 238 U. S. 1, 19.

Accordingly, it is respectfully submitted that no Federal question was raised by the bill in this case, and therefore it was properly dismissed.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General.

H. WARE BARNUM,
Assistant Attorney-General.

In the
Supreme Court of the United States.

October Term, 1917.

No. 420.

HENRY G. S. NOBLE, AS PRESIDENT OF THE NEW YORK STOCK EXCHANGE, *Appellant*,

v.

THE UNITED TELEGRAM COMPANY, CALVIN H. FOSTER AND THE MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *Appellees.*

BRIEF FOR THE MASSACHUSETTS PUBLIC SERVICE COMMISSION.

STATEMENT.

This case and case No. 419 present the same situation as to facts, except that in this case the quotations are furnished by the Stock Exchange to the United Telegram Company in New York and are transmitted to the office of the United Telegram Company in Boston over wire of the Postal Telegraph Cable Com-

pany. Upon receipt in Boston and translation from Morse code to English letters and numerals, the quotations are then sent by the United Telegram Company over its own ticker system to the various customers in Boston.

The same legal questions are presented as in case No. 419, except that the interstate transmission from New York to Boston is somewhat more definitely delimited from the intrastate operations in Boston by the fact that the interstate transmission from New York to Boston is over the wire of an independent carrier, to wit, the Postal Telegraph Cable Company.

Respectfully submitted,

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